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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

H. F. ALLEN ORCHARDS, et al., ELBERT B. SCHINMANN, et al.,
R. E. REDMAN & SONS, INC.,
Petitioners,

VS.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The specific important questions presented pursuant to United States Supreme Court Rule 17(.1)(c) necessarily include, in their context, the following frame of reference which is incorporated into each question:

A. Petitioner water users are three hundred thirty-four individuals, corporations and other entities in the Yakima, Washington basin who suffered catastrophic damages in 1977 because of the failure of the United States, through the Bureau of Reclamation, to comply with express and necessarily implied terms of controlling contacts for delivery of irrigation water.

B. This case centers on the reclamation program in the Western United States, and more specifically on the relationship between (1) the United States, through the Bureau of Reclamation (Bureau), and (2) the owners of water rights and users of water collected and distributed by the Bureau (which relationship is delineated by the Reclamation Act of 1902, as well as a series of contracts, including a consent decree between the Bureau and irrigation and reclamation districts, which districts act as a conduit for contracting with the Bureau on behalf of the water users).

Accordingly, the specific important questions include:

1. Whether the lower courts erred in holding as a matter of law that the United States, through the Bureau, did not breach its contractual obligation to petitioners when it failed to calculate in a competent and timely manner the total water supply available for irrigation in the Yakima Valley Project in 1977 in complying with the contracts' requirement of proration of water when:

(a) The Bureau informed petitioners in February, 1977, that there would be insufficient water available to meet their needs, when such water was in fact available, and the erroneous information was due to an admitted and inexcusable failure by the Bureau to correctly compute the extant water in its system;

(b) The petitioners must know in February of each year, the amount of water that will be available to them during the growing season, to permit appropriate crop selection and the making of other critical decisions;

(c) The Bureau undertook to inform the petitioners in February, 1977 that there would be insufficient water available to meet their needs, according to its own understanding and application of its contractual obligations and the intent of the contracting parties;

(d) The Bureau is fully aware of the petitioners' need for early information; and

(e) In reasonable reliance on the erroneous information the petitioners received, (and in spite of efforts to mitigate damages) petitioners suffered a loss in excess of twenty-two million dollars.

2. Whether the announcement by the United States that it would not deliver the water to which petitioners were entitled, amounted to an anticipatory breach, or a repudiation, of the controlling contracts.

3. Whether the entire contracts are rendered illusory when the right of petitioners to know the amount of water that will be available to them in the growing season is eliminated as an enforceable contractual right.

4. Whether the lower courts misapplied existing law when they failed to recognize that the United States stands in a fiduciary relationship to the water users, and the correlative rights and duties that flow therefrom.

5. Whether the opinions below conflict with controlling precedent and/or are repugnant to the strong public policies upon which water law and reclamation law in the United States are founded.

PARTIES

Petitioners, who were plaintiffs in three consolidated cases in the Claims Court, and appellants in the United States Court of Appeals for the Federal Circuit, are three hundred thirty-four individuals, corporations and other entities who are shareholders in fifteen irrigation and reclamation districts. Petitioners are water users and own the water rights which are the subject matter of this litigation. They are farmers. Each of the petitioners, the real parties in interest in this case, is identified by name and district at pages A-34 through A-42 of Appendix D submitted herewith.

Respondent (defendant in the Claims Court and Appellee in the United States Court of Appeals for the Federal Circuit) is the United States.

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VS.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Claims Court opinion, dated February 21, 1984, is reported at 4 Cl.Ct. 601 (1984) and is pages A-9 through A-30 of Appendix B submitted herewith.

The opinion of the United States Court of Appeals for the Federal Circuit dated December 10, 1984, is reported at 749 F.2d 1571 (1984), and is pages A-1 through A-8 of Appendix A submitted herewith.

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit entered judgment on December 10, 1984. A petition for rehearing was timely filed. On January 30, 1985, the Court of Appeals entered an order denying that petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

The statutes involved in this case include the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*

43 U.S.C. § 523 is reproduced on page A-112 of Appendix H submitted herewith. Nothing with sufficient particularity to justify reproduction appears in any other section of the Reclamation Act.

STATEMENT OF THE CASE

The Court of Appeals for the Federal Circuit has issued an opinion contrary to the letter and spirit of decisions of this Court, and with established precepts of water law, contract law, and the law of fiduciaries. The Court of Appeals erred in holding, as a matter of law, that the United States, through the Bureau of Reclamation (hereinafter "Bureau") did not breach its contractual obligation to petitioners (hereinafter "farmers")[1] when the Bureau informed the farmers in February, 1977, that

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[1] In this petition:

(a) "the farmers" refers to the petitioners in this action, all of whom are engaged in the enterprise of farming in the Yakima Valley;

(b) "water users" refers to the larger category of which the farmers are a part: i.e., all those engaged in irrigation and reclamation, pursuant to contracts between the United States, through the Bureau of Reclamation of the Department of the Interior, and the various reclamation districts (however denominated).

there would be insufficient water available to meet their farming needs. The Court of Appeals reached this decision in spite of the fact (a) that the controlling contracts expressly and impliedly obligate the Bureau to make a timely and competent computation, proration, and allocation of the total water supply available to the farmers in short water years, prior to the beginning of the irrigation season; (b) that such water was in fact available; and (c) that the erroneous information given by the Bureau to the farmers was due to the Bureau's admitted and inexcusable failure to correctly compute a scientifically computable fact, namely the extant water in the system. The Court of Appeals also failed to recognize the fiduciary relationship between the Bureau and the water users and the relationship's correlative rights and duties involved in this case.

The controlling contracts consist of

> (1) a stipulated judgment dated January 31, 1945 in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, Civil No. 21, District Court of the United States for the Eastern District of Washington, Southern Division (hereinafter "Consent Decree", submitted herewith on pages A-77 through A-109 of Appendix F), which was the subject of review by the Ninth Circuit Court of Appeals in *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 626 F.2d 95 (9th Cir. 1980); and
>
> (2) a series of individual repayment contracts and amendments thereto[2] between the United States government and the farmers for delivery of water for the growing of crops, executed for the farmers by the irrigation districts.[3]

The Consent Decree, without dispute, requires a *proration* of the total water supply available (hereinafter "TWSA") in short

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[2] Much of the language and concept of the Consent Decree was introduced by amendment after 1945 into the actual contracts between the Bureau and the several districts.

[3] An example of such repayment contract is the Roza Irrigation District Amendatory Repayment Contract (1953), submitted herewith on pages A-113 through A-147 of Appendix I.

water years. See Argument, Point II, *infra*. The necessity of proration is undisputably a contract term. Both the trial and appellate courts held that the Bureau is required under the Consent Decree to compute and distribute the TWSA.[4]

The heart of this dispute centers on the events in early 1977. On February 7, 1977, the Yakima Office of the Bureau of Reclamation undertook to prorate the available water pursuant to the contracts, according to its own understanding and interpretation of the contractual proration process and the intent of the contracting parties. By an egregious, admitted error in the process, the Bureau grossly understated to the farmers the amount of water available for proration prior to the time when the farmers were to plant crops based, in the main, on a miscalculation in applying an erroneous formula to available water. (See Argument, Point II, *infra*).

In reliance upon the Bureau's announcement, the farmers took a variety of actions: they let acreage lie fallow, reduced planted acreage, substituted less lucrative crops requiring smaller amounts of water, drilled wells, and literally dug up whole crops and moved them out of the valley. When it became apparent many months later that the water was in the system all along, it was too late, and the farmers suffered catastrophic losses.

It is obvious and has in fact been conceded by the Bureau that unless the farmers know what water will be available to them early in the year they cannot properly plan and plant. In spite of this, both courts held that the fact that the Bureau egregiously erred was without consequence, since "negligent performance of a noncontractual duty cannot be the basis of a breach of contract claim." *H. F. Allen Orchards v. United States*, 749 F.2d at 1576.

This is the heart of the court's error. Without timely information as to the water available, the fact that water may later turn out to be available is not significant. To require the farmers

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[4] The Court of Appeals reversed the Claims Court on some parts of its ruling, notably that the farmers were not real parties in interest and therefore unable to prosecute this action. *H. F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984).

to merely plant-and-hope, when information that will permit proper planning and give security is readily available to the Bureau, cannot meet the requirement of good faith and fair dealing inherent in every contract, particularly one grounded in a fiduciary relationship.

If, as conceded, the Bureau had a duty to compute and prorate the TWSA, it had a duty to

(1) compute it *competently*; and

(2) share that information with the farmers who own the rights in the water.

Without these, the obligation is meaningless.

The decisions below create a situation in which contractual rights which have been assumed by the farmers to be fundamental have been found to be illusory. The courts below have held that the Bureau may deny the farmers information as to the amount of water in the Bureau system that will be available to the farmers at the time of year the farmers absolutely require such information. Without this information, the farmers do not know where they stand on questions essential to the conduct of their business. Without this knowledge, the contracts are hollow and the system unworkable. At a time when agriculture throughout the country is facing almost unprecedented economic problems, the farmers of the West do not deserve this additional burden.

The Court of Appeals also erroneously and mistakenly characterized this case as one centering on forecasting. *H. F. Allen Orchards v. United States,* 749 F.2d at 1573-1575. The weather forecasting analogy is inappropriate and irrelevant to this case, which centers on *extant* water in the Yakima Project and the Bureau's erroneous computations thereof, rather than weather forecasting. See Argument, Point II D *infra.*

The decisions below are also repugnant to firmly established, and clearly prudent, public policies which have defined water rights and reclamation practice since their infancy in this country, as well as an abrogation of the fiduciary relationship between the government and the farmers.

Commencing with (and in some particulars preceding) the Reclamation Act of 1902, also known as the Warren Act (43 U.S.C. § 371, *et seq.*), and continuing to the present day, government and private persons have cooperated on a massive scale to bring to pass the reclamation of millions of acres in the arid West from idleness into productivity through the use of irrigation.[5]

The role of government has been to collect, store and distribute water. The purpose of such collection, storage and distribution specifically articulated in the Warren Act—is to bring the water into the hands of the water users who own the water rights and who perform the actual acts of reclamation. 43 U.S.C. § 523; see also *Bryant v. Yellen*, 447 U.S. 352 (1980); *Ickes v. Fox*, 300 U.S. 82 (1937);[6] *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941).

The role of the farmers and other users of the water is to perform the acts of reclamation.[7]

A clearly defined structure has been gradually built, through the decades, out of statutes, regulations, case law and a continuing pattern of custom and dealing. In this structure, the respective roles of (1) the Bureau, the federal presence in the ongoing drama; (2) the various irrigation and reclamation districts formed as conduits between the Bureau and water users, and (3) the

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[5] The history of American reclamation is documented in prior decisions of this Court, notably *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) and *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896). These decisions illuminate the monumental, and often heroic, dimensions of the enterprise. The contributions of reclamation to the growth and prosperity of the Western United States can hardly be overstated.

[6] It is not without significance that *Ickes v. Fox*, one of the landmark reclamation decisions of this Court, dealt with the Yakima project.

[7] Unlike many government projects, reclamation was intended to pay, and has paid, for itself. III Kinney, *A Treatise on the Law of Irrigation*, p. 2338 (Bender-Moss Co. (1912)). See also *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

ultimate users, who are usually (as here) the actual owners of the water rights, have become defined and understood.

Since these matters are controlled by statutes, case law, and bureaucratic regulation, the farmers and other water users are forced to function within the system created by the government. The water users have no options, and in a real sense are at the mercy of the government.

In spite of this coercive element, this relationship has been productive. It has been productive largely because each of the three groups of actors have known their own rights and duties and the rights and duties of the others, and the rights have been exercised and the duties performed in an atmosphere of pervasive trust, generosity and confidence.[8]

In view of the continual contacts that occur between the actors engaged in reclamations and the need of water users to make and act upon long-term plans and decisions, this reciprocal trust has been of inestimable value, central to the success of the enterprise. This trust has been substantially undermined by the events that occurred in the Yakima (Washington) Valley in 1977, commencing with a February announcement by the Bureau that the farmers would receive only seven percent (7%) of their entitlement that year, even though there was enough extant water in the system to meet historical needs, and in the judicial actions that followed (discussed more fully below).

Especially in light of the above-described fiduciary relationship, the equities in this case are compelling. The farmers found themselves in a situation beyond their control. They behaved prudently, even diligently, doing all they could to prevent or mitigate damage. The harm they suffered was due solely to the Bureau. The Bureau has acknowledged its culpabilities ("we blew it", said the project superintendent). The damage could and should have been avoided.

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[8] It is apparent and has been expressly recognized, that reclamation activities advance the public interest. See, e.g. *Bryant v. Yellen*, 447 U.S. at 375.

The economic dislocation and human misery which resulted from the Bureau's multiple error has been enormous. The incident was a cause celebre in central Washington, and has generated reams of newspaper copy (much of which is, with authenticating declarations, in the record below). The events of 1977 were catastrophic for the farmers. Their aftermath has brought a loss of trust, and a sense of confusion and futility.[9]

BASIS OF JURISDICTION IN CLAIMS COURT

The basis for federal jurisdiction in the court of first instance, the Claims Court (the Court of Claims at the time the action was instituted), is the Tucker Act, 28 U.S.C. §1491.

ARGUMENT

I

THE FEDERAL CIRCUIT DEPARTED FROM PRECEDENT OF THIS COURT IN NOT RECOGNIZING THE FIDUCIARY RELATIONSHIP WHICH EXISTS BETWEEN THE UNITED STATES AND WATER USERS

Not only are the farmers and the Bureau bound by contract (see Statement of the Case and Argument, Point II); they stand in a special fiduciary relationship which enhances the Bureau's obligations.

Nevada v. United States, 103 S.Ct. 2906 (1983) is instructive. After discussing the special "obligation of trust" (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)) the

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[9] Because this is a review of a summary judgment, the farmers are entitled to have the facts stated in the light most favorable to them. However, an effort has been made to make this presentation accurate, balanced and fair. To the degree that disputed issues of material fact exist (and there are many of these) the lower courts, of course, erred on a ground wholly independent of those here presented, in granting summary judgment.

government bears to Indian tribes, this Court noted that the government assumed obligations of similar gravity in relation to reclamation of private lands under the Reclamation Act. 103 S.Ct. at 2917. The opinion addresses the tension placed on the government in this conflict in claims to water rights between two groups with whom the government bears a special trust relationship.[10]

In an analogous context (Indian timber lands), this Court also recently recognized that a special "trust relationship" imposes a high standard of performance on the government, and "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *United States v. Mitchell*, 103 S.Ct. 2961, 2973 (1983).

That the Bureau's responsibility to the farmer-water users is a fiduciary one has been explicitly stated and implicitly acknowledged by this Court for almost half a century. See, *e.g.*, *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 614-615 (1945); *Ickes v. Fox*, *supra*, 300 U.S. at 95; *Ide v. United States*, 263 U.S. 497, 505-506 (1924). See also *Lawrence v. Southard*, 73 P.2d 722, 728-729, 192 W. 287, 299 (1937).

By failing to recognize this trust relationship, and by reaching a result inconsistent with fiduciary principles, the Court of Appeals has:

(1) decided an important question of law central to the functioning, as intended, of an established and vital federal program (reclamation) in conflict with applicable decisions of this Court; and

(2) thrust distress into the lives of hundreds of thousands of water users who have previously dealt with the United States in an atmosphere of confidence and trust.

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[10] In his concurrence in *Nevada v. United States*, Justice Brennan offered this thought on a different point, but nonetheless of striking applicability to this case.

> [T]he law can and should fix resposibility for loss and destruction that should have been avoided. 103 S.Ct. at 2926.

The Court of Appeals' holding is entirely at odds with the rights and duties inherent in this fiduciary relationship. A recognition of the fiduciary relationship between the Bureau and the farmers would necessarily mandate a finding that the Bureau had the duty to compute the TWSA in a timely and accurate fashion, for communication of the TWSA to the farmers is clearly mandated by the high fiduciary duty of a stakeholder, carrier or trustee as recognized by the Bureau in the Vissia Report[11] (App. E, p. A-63)[12] and in its own prior practice. See Restatement (Second) of the Law of Trusts, § 170, § 173, Note(d) (Duty to communicate all material facts which trustee knows or should know); § 174 (Duty to exercise reasonable skill and care).[13]

II

THE VITAL BUT FRAGILE RELATIONSHIP BETWEEN THE UNITED STATES GOVERNMENT AND WATER USERS IN THE JOINT RECLAMATION EFFORT HAS BEEN RUPTURED BY THE DECISIONS BELOW

A. What Was Certain Is Now Uncertain

As set out above, the relationship between the Bureau, the districts and the farmers is controlled by the Consent Decree and a series of repayment contracts and amendments thereto.

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[11] "Vissia Report" refers to a document prepared in mid-1977 by the Regional Office of the Bureau (Boise), in response to a request from Keith Higginson, Commissioner of the Bureau, to investigate the events herein described. Prepared under the direction of Rod Vissia, Regional Director of the Northwest Regional (Boise) Office of the Bureau of Reclamation, its full title is *Review of 1977 Water Supply Estimates Yakima River.* Reproduced entirely in Appendix E at pp. A-43 through A-76 , the Vissia Report concedes the nature and scope of the Bureau's error.

[12] "App." will hereafter refer to the Appendix submitted herewith.

[13] In *United States v. Mitchell,* 103 S.Ct. at 2973, this Court cited the Restatement (Second) of the Law of Trusts, in defining the fiduciary standard to which the government is held in trust relationships. The sections of the Restatement cited in the text bear directly upon this action and would *preclude* the result reached.

By its terms, the Consent Decree constituted "a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources" to the districts and water users. App. F, p. A-105.

The Bureau's duty under the Consent Decree was clearly articulated in *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 626 F.2d 95, 97 (9th Cir. 1980):

> "[T]he Bureau was obligated to distribute the available water according to the priorities of the parties that had been established according to the law of the State of Washington . . . The consent decree established an allocation schedule which defined the obligation of the Bureau of Reclamation 'to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants, and to the Wapato Indian Irrigation Project.' "

As noted by the Ninth Circuit, the Consent Decree defines the Total Water Supply Available (herein "TWSA") for delivery as being constituted by that amount of water available in any year from three components:

> (1) from *natural flow* of the Yakima River, and its tributaries,
>
> (2) from *storage* in the various government reservoirs on the Yakima watershed, and
>
> (3) from "*other sources.*" App. F, p. A-103; emphasis added.
>
> "Other sources" means return flow. See pages 13-14, *infra.*

In years in which there is sufficient water available in the system to meet entitlements, all goes well. In water-short years, the Consent Decree requires that the TWSA be computed and distributed *first* proportionately to the senior water holders ("nonproratables"), and *then* proportionately to the remaining water holders ("proratables"). App. F, p. A-103.

All the petitioners in this action are proratables, at least as to the matters in controversy.

It is important to note that these events occurred in the Yakima Valley in Eastern Washington, where a model reclamation project[14] has been in place since 1905.[15] The Yakima Valley is the principal home of the celebrated Washington Delicious Apple. Most of the mint and hops grown in this country, and a representative variety of other crops, come from the valley. The Yakima Project is a prototype of what a reclamation project should be. It is self-supporting and has generated income of a multiple of its cost.[16]

On February 7, 1977, the Yakima office of the Bureau issued a shocking and unprecedented announcement: proratable users would receive only seven percent (7%) of their entitlement during 1977. F.C. App. V, p. 0822. The supposed factual premise of this announcement was the Bureau's conclusion that only 1,200,000 acre feet of water, substantially less than the normal supply, would be available. The Bureau was wrong in its premise.

Upon being informed that insufficient water would be available to them for their usual crops in 1977, the farmers immediately began to consider their remaining options. The plans which had been formed, assuming traditional water availability, were abandoned. Although the deliveries of irrigation water did not actually begin until April, it is conceded by the United States that Yakima Valley farmers must plan the type of crops which they would plant, make other vital decisions, and take preliminary

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[14] A stylized schematic map of the Yakima Project, showing the six storage reservoirs and the supporting system of diversion dams, rivers, canals and gages, which irrigate 500,000 acres, is presented in App. E, p. A-60.

[15] F.C.App. VII, pp. 1258-1266 (Deposition of William Gray, Superintendent in 1977 of the Yakima office of the Bureau). "F.C.App." refers to the appendix filed in the Court of Appeals for the Federal Circuit.

[16] F.C. App. V, pp. 0805-0806 (1950 Bureau of Reclamation Informational Release).

steps in February and March. F.C. App. VII, pp. 1302-1308 (Gray Deposition); F.C. App. VI, p. 1149 (Deposition of Onni Perala, Chief of the Hydrological Division of the Yakima Project). They must know how much water they will have.

In reliance upon the Bureau's projections, the farmers took a variety of actions described above including letting acreage lie fallow, reducing planted acreage and substituting less lucrative crops requiring smaller amounts of water.

Over the next few months, as the surrealistic events unfolded, the Bureau kept being surprised by finding more and more water in the system. Starting in April, new announcements were issued every few weeks upgrading the reading of available water.

Even though final precipitation levels in 1977 were somewhat lower than the norm,[17] proratables eventually had available seventy percent of their allotment, or about the amount of the historical diversion.[18] By the time it was known that this water would be available, it was too late for the farmers. They suffered catastrophic losses, and the District ended the year with a huge surplus of unclaimed water. F.C. App. VII, p. 1309 (Gray Deposition).

What happened?

Due to egregious error, the Bureau correctly applied only *one* factor of the three-factor Consent Decree TWSA formula. The Bureau simply failed to recognize the amount of extant water in the project works and thus grossly understated to the farmers the amount of water actually available for distribution.

The particular computational errors were two:

(1) Return flow (water returning to the system after diversion for irrigation which is thus available for further

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[17] See App. E, p. A-67. This defuses the Bureau's argument, constructed years after the fact, that the additional water in the system was *really* attributable to heavy rainfall.

[18] "Historical diversion" refers to the water actually diverted over the years pursuant to outstanding entitlements. Most water users do not traditionally claim all the water to which they are entitled by contract.

diversion) was omitted. F.C. App. VI, p. 1099 (Deposition of Larry Vinsonhaler, the Bureau's Chief Regional Planning Officer). As the Bureau acknowledged, the phrase "and from other sources" in the Consent Decree formula is equated with return flow.[19] At least since 1919, the Bureau has recognized the significance of return flow in computations of available water. F.C. App. VII, pp. 1290-1293, 1308 (Gray Deposition); F.C. App. VI, pp. 1168-1169 (Perala Deposition).

(2) Runoff from the Yakima water basin, necessary to determine natural flow, was not computed *at all*; rather, a "guesstimate" not based upon any empirical system whatsoever, was substituted. App. G, p. A-110—A-111 (memorandum from Gray to Rod Vissia, Regional Director of the Bureau). Vissia conceded that this type of guessing departed from Bureau standards. F.C. App. VI, p. 1026 (Vissia Deposition). This error can only be termed deliberate.[20]

It is not necessary that the particulars of this tragic sequence be spelled out in this document. It is sufficient for present purposes to note that the errors did not involve arcane formulae or esoteric knowledge on the cutting edge of science. One error was simply overlooking one factor in a simple three-factor formula. The other was making a knowing choice to rely on guesses where computations could and should have been made.

B. The Bureau Breached Its Contract With the Farmers

As set forth in the Statement of the Case, the Bureau clearly breached its contract with the farmers by failing to provide them with a proper and timely TWSA computation.

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[19] F.C. App. V, pp. 923-924, 927, 932. (Brief for the United States in *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist., supra.*)

[20] Detailed narrative account of how the Bureau fell into these errors, in context, is found on pp. 20-35, 60-64 of the farmers' Motion for Summary Judgment in the Claims Court and at pp. 8-18, 26-28 in the Appellant's Opening Brief in the Court of Appeals.

While the facts in this case are not identical, *Owyhee Ditch Co. v. United States*, 126 F.Supp. 429 (D. Ore. 1954) is a persuasive precedent. In *Owyhee Ditch*, the United States breached its contract to deliver water to the plaintiff, when it had sufficient water to meet its contractual obligations, because it negligently discharged water from that system. Here, the United States also had sufficient water in its reservoir system to meet its contractual obligations, but negligently (and intentionally) failed to correctly compute the amount of that water as required by contract, thus denying the plaintiffs of its benefit. Logically, the same result would follow in both cases.

The decision of the Federal Circuit will have ramifications far beyond the party litigants. The language in the repayment contracts in the Yakima Basin is largely boilerplate, drafted by the Bureau, and widely used. "[T]he contract between these associations and the Federal Government . . . must be in accordance with the Government's method . . . or not at all." III Kinney, *A Treatise on the Law of Irrigation*, p. 2338 (Bender-Moss 1912).

What was true in 1912 is even more true today. The Bureau has not gotten less bureaucratic with the passing years. This decision undermines the network of contracts and agreements of not only the water users of the Yakima project, but of water users elsewhere throughout the West as well. Because of the lower courts' rulings, the Bureau now has *no* contractual obligation in short-water years to share with water users, who own *vested* and *absolute* rights in the water in question (*Ickes v. Fox*, 300 U.S. at 96-97), the basic and necessary information it has about how much of their water is available to them. Water users plant at their own risk. The climate of trust and shared enterprise that has been characteristic of reclamation work has been ruptured. It is not hyperbole to state that the situation is intolerable.

C. In Any Event, the Duty to Inform the Farmers of Available Extant Water is Necessarily Implied in the Contracts

It is axiomatic that a contract must be interpreted to give a meaning to all parts, and specifically to avoid making the contract illusory. 3 Corbin on Contracts, § 546 (1960).

A contract must be construed according to the intent of the parties, as demonstrated from the whole contract and its purposes and not from any single detached part alone. *North American Philips Co. v. United States*, 358 F.2d 980 (Ct.Cl. 1966); *Stender v. Twin City Foods, Inc.*, 510 P.2d 221, 82 Wash.2d 250 (1973).

> "In construing a contract, *it is not sufficient to look to the cold language alone.* Words in a contract are used to convey the meaning and intent of the parties. Such intent is gleaned not only from what is expressly stated therein *but also from what is of necessity implied from the language used.*" *General Finance Corp. v. Dillon*, 172 F.2d 924, 927-28 (10th Cir. 1949) (emphasis added).[21]

Accordingly, a contract imposes not only duties expressly stated but those necessarily implied to give substance and meaning to the express provisions of the contract. *General Finance Corp. v. Dillon, supra; Suess v. Heale,* 416 P.2d 458, 68 Wash.2d 962 (1966).[22] Timely information to farmers as to water available is

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[21] A California case, written by Chief Justice Roger Traynor, illustrates the concept well. In *Langley v. Pacific Gas & Electric Co.*, 41 Cal. 2d 655, 262 P.2d 846 (1953), the California Supreme Court found that the duty to inform a customer of a power outage was necessarily implied in a power supply contract between a power company (P.G.&E.) and a fish hatchery. Justice Traynor determined that this contractual duty to inform plaintiff was necessarily implied because *inter alia* (a) P.G.&E. agreed to furnish plaintiff electricity and to exercise reasonable skill and care in so doing; and (b) P.G.&E. knew that a continuous power supply was imperative to plaintiff and his hatchery.

[22] In tort law, if a party performs an act it has no duty to perform and engenders reasonable reliance, that party must perform the act in a competent fashion or be held answerable for the consequences of its incompetence. *Indian Towing Co. v. United States,* 350 U.S. 61, 69 (1955).

How much more clearly present is the duty to perform competently when the act in question is stated or necessarily implied in a contract, required to enable the benefits of the contract to be enjoyed, and reliance on competent performance is both *known* and *reasonable.*

necessary to give substance and make meaningful the water availability.[23]

This idea pervades many areas of law. The Uniform Commercial Code (§ 2-615(c)) provides:

> "The seller must notify the buyer seasonably that there will be a delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

This duty of the Bureau to timely and competently compute the TWSA is necessarily implied from the contracts in the context of the surrounding facts and circumstances. Without this notification in a short-water year, the Bureau's contractual obligation to deliver water is illusory. Unless the farmers know the TWSA well before actual delivery, they cannot take advantage of the water.

D. The Nature of the Controversy Has Been Critically Mischaracterized by the Lower Courts

It must be stressed that this case deals with water *already* in the Yakima Project in January, 1977, under the Bureau's control, and available to the farmers for their use.

One of the major flaws in the Court of Appeals opinion is treating this controversy as one centering on forecasting. *H. F. Allen Orchards v. United States,* 749 F.2d at 1573-1575. The controversy centers on *extant water.* Weather forecasting cases present wholly different questions of fact, law and equity, and are not helpful even by analogy.[24]

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[23] The act of the Bureau in informing the farmers that they would not get water, when that water was available and belonged to the farmers may also be fairly characterized as an anticipatory breach or contract repudiation. *Roehm v. Horst,* 178 U.S. 1 (1900); Restatement (Second) of the Law of Contracts §§ 243, 250 (1981).

[24] Even with lower-than-average precipitation (Vissia Report, App. E, p. A-67), there was sufficient water in the Yakima Project System in 1977 to meet historical diversions.

E. The Government Concedes the Essential Elements of the Farmers' Case

It is significant to note that the farmers' case was largely built on *concession*. The Bureau, through duly empowered supervisory officials, has conceded that:

(1) The Bureau had a contractual duty to correctly compute the TWSA.[25] App. E, p. A-67 (Vissia Report). This duty specifically includes an early computation of how much water will be directed. "In order that the water users would be aware of the anticipated supplies that they would have available for use in 1977, the TWSA was computed and distributed under the Consent Decree." App. E, p. A-67 (Vissia Report). The Bureau's attempt to compute the TWSA and notify the farmers is a clear *concession by conduct* of the Bureau's obligation in this particular.

(2) The Bureau failed to properly perform this duty and thus breached the contract in that it did not correctly account for the water in its system: "[R]eturn flows had not been properly accounted for if the provisions of the Consent Decree are to be applied."[26] App. E, p. A-71—A-72 (Vissia Report). The runoff "guesstimate" departed from Bureau standards. F.C. App. VI, p. 1026 (Vissia Deposition).

(3) The farmers need to know the water that will be available to them well before April first to make critical farming decisions. The less water available to them, the more limited are their options. F.C. App. VII, pp. 1302-1303; (Gray Deposition); F.C. App. VI, pp. 1096-1097 (Vinsonhaler Deposition).

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[25] Under controlling law, this Court should have given great weight to the Bureau's own interpretation of its duties under the Consent Decree and subsequent contracts. See, *e.g., Chevron, U.S.A. v. National Resources Defense Council,* 104 S.Ct. 2778, 2782 (1984); *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978).

[26] This was expressed with particular pungency by William Gray in a newspaper interview: "We blew it. There's really no other way to say it. There was water in the system that we didn't know we had . . . It's as simple as that– we blew it." F.C. App. VI, p. 1003 (*Yakima Herald Republic,* Friday, Feb. 9, 1979, p. 2.)

(4) The acts of the farmers in reliance on the government's pronouncements, and in an effort to mitigate their losses, were reasonable and appropriate. F.C. App. VII, p. 1303 (Gray Deposition), F.C. App. VI, p. 1097 (Vinsonhaler Deposition), F.C. App. VI, p. 1149 (Perala Deposition).[27]

CONCLUSION

In a decision with a potential for far-reaching disaster, the Court of Appeals has held that contractual rights upon which petitioners in this case and water users in the West generally have come to rely on are in fact illusory. The error goes to the very center of the reciprocal relationship of trust and confidence on which the water users and the United States have based their dealings and decisions in the reclamation program since 1902.

The decision is illogical, inequitable and inconsistent with controlling precedent and public policy. For all the reasons herein stated, this petition should be granted and the judgment below reversed.

Dated: April 29, 1985

Respectfully submitted,

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[27] The concessions, for the most part, were contemporaneous utterances, made during or soon after the Bureau's gaffe was discovered. They are spontaneous and inherently believable. Predictably, during this litigation, the Bureau has attempted to massively recant, disclaim, and reinterpret.

84-1702 (2)

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

H. F. ALLEN ORCHARDS, et al., ELBERT B. SCHINMANN, et al.,
R. E. REDMAN & SONS, INC.,
Petitioners,

VS.

THE UNITED STATES,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Appendix A

United States Court of Appeals
for the Federal Circuit
Appeal No. 84-937
H. F. Allen Orchards, et al.,
Elbert B. Schinmann, et al.,
R. E. Redman & Sons, Inc.,
Appellants,
v.
The United States,
Appellee
Decided: December 10, 1984

Before Markey, *Chief Judge,* Nichols, *Senior Circuit Judge,* and Newman, *Circuit Judge.*

Nichols, *Senior Circuit Judge.*

This is an appeal from a judgment by the United States Claims Court denying appellants' motions for summary judgment and allowing appellee's cross-motions for summary judgment. The jurisdiction of that court was invoked under the Tucker Act, 28 U.S.C. § 1491. Appellants seek damages from the United States based on the United States Bureau of Reclamation's (Bureau) asserted breach of a contractual obligation to inform appellants accurately in February 1977 of the total amount of water expected to be supplied to them from the Yakima water project during the 1977 growing season. The Claims Court found that (1) the Bureau had no contractual obligation to forecast the water supply and (2) the appellants were neither parties to any contract with the Bureau nor third-party beneficiaries of contracts between the Bureau and the irrigation districts from which the appellants were furnished their water.

Although we disagree with the Claims Court's assessment concerning appellants' right to sue as third-party beneficiaries to the district-Bureau contracts, we conclude, as the court below did, that the Bureau has undertaken no contractual obligation to furnish accurate water supply projections. Therefore, we affirm

the Claims Court's granting of appellee's motion for summary judgment and its dismissal of the complaints.

Facts

The circumstances from which this litigation arose have been set forth in detail by the court below in *Orchards v. United States*, 4 Cl. Ct. 601, 602-04 (1984). Therefore we recount only briefly the most salient facts of this case. Appellants, who farm parts of the eastern section of the State of Washington, are members of the Yakima Project Irrigation District. In 1905, the Secretary of Interior, acting pursuant to the Reclamation Act of 1902, 32 Stat. 390 (codified throughout 43 U.S.C. ch. 12 (1976)), authorized the construction of the Yakima Project, which stores, diverts, and delivers irrigation water from the Yakima River. The Bureau contracts to deliver water from the Yakima Project to irrigation districts organized under Washington State law. The districts, and ultimately the water users, are charged by assessment to repay the costs of the project's construction and for government operating and maintenance costs.

The method of determining the proper allocation of water for various irrigation districts is founded upon a consent decree entered by the United States district court in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District* (Eastern District of Washington, Southern Division, Civil Action No. 21). The decree sets forth the normal allotment of water as well as the procedure for allocation of water in times of shortage. In such times the "Total Water Supply Available" (TWSA), defined as:

> that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States [,]

is to be allocated first to those with senior, nonproratable water rights and then to the extent possible to those holding junior,

proratable rights. Appellants base their claims on the irrigation districts' contracts with the Bureau which incorporate this consent decree by reference and on the decree itself.

The Yakima area experienced a water shortage in the first months of 1977 due to drought and low snow pack. On February 7, 1977, the Bureau issued a TWSA estimate projecting that the districts would receive 100 percent of their nonproratable entitlements and only approximately 7 percent of their proratable allotments. Farmers having proratable water rights reacted to the estimate by planting less water-intensive crops, allowing lands to lie fallow, selling off livestock prematurely, and generally acting to reduce water consumption.

In the months following the original TWSA estimate, the Bureau upgraded the TWSA several times. Ultimately those with proratable rights received 70 percent of their entitlements, the correct amount under the circumstances. Nevertheless, by the time the farmers learned that they would receive this water, allegedly it was too late to avoid losses in the millions of dollars. Appellants allege that the Bureau breached its contracts by estimating the TWSA negligently in February 1977. The Bureau counters that its February estimate, provided by the Bureau as a sovereign act, was as accurate as possible given the information available and thus not negligent, and that the upgrading of the TWSA several times was a result of unforeseen precipitation and return flow. The appellants believe and would attempt to show that incorrect forecasting of future weather was not the sole cause of the errors; that it was due also to errors as to the extent water, once delivered to users of it, returns to the system and is again available to downstream users.

Discussion

In reviewing the Claims Court decision granting summary judgment, we note that appellants receive the benefit of all applicable presumptions, inferences, and intendments and that summary judgment is appropriate only when there is no genuine issue of material fact. *Adickes v. S. H. Kress and Company,* 398

U.S. 144 (1970). We agree with the Claims Court's determination that there is no genuine issue of material fact and that appellee is entitled to judgment as a matter of law as the Bureau was under no contractual obligation to accurately estimate the TWSA. Appellants' action sounds not in contract, but in tort, if it lies at all, and the Tucker Act, which was the source of jurisdiction, confines it to "cases not sounding in tort." Section 1491(a)(1).

Appellants assert that their contract right to receive a properly estimated TWSA is premised upon the *Kittitas* consent decree, and contracts which incorporate that decree. The farmers construe the decree as including an implied requirement to communicate TWSA computations; the requirement is allegedly necessitated by the farmers' need to know their allocations in order to plan correctly which crops to plant and the acreage to be planted. Thus the right to water is conditioned on timely notice of the allocation.

We discover no contractual duty to project the TWSA correctly, or at all, or warranty that any projection made will be correct. A consent decree is construed as a contract for enforcement purposes, and aids to construction, such as circumstances surrounding formation of the decree and the technical meanings words may have had to the parties, may be considered. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). Still, the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it or by what might have been written had the plaintiff established his factual claims and legal theories in litigation." *Firefighters Local Union No. 1784 v. Stotts*, 52 U.S.L.W. 4770, 4779 (U.S. June 12, 1984) (quoting *United States v. Armour & Co.*, 402. U.S. 673, 681-82 (1971)).

Appellants cannot point to, nor can we find, any provision of the consent decree which expressly obligates the Bureau to forecast the TWSA. The consent decree specifies that the "obligations of the United States to *deliver* water from the * * * Yakima River" are set forth in the agreement, and in paragraph 18, provides for the instance when a shortage occurs.

> If for any cause it is impossible to supply fully [the normal water] quantities, the water subject to proration * * * shall be proportionably diminished. The pro rata share of that water which each of the parties to this judgment shall receive during a period of insufficient supply shall be an amount in the same proportion to the quantity of water subject to the proration that each of the parties is entitled to under this judgment as the total water supply available, as hereinafter defined * * *.

This paragraph and the definition of TWSA are the sum and sole expression of the government's decree-based obligation in the event of a water shortage. Indeed, the parties characterized and limited the decree in the final paragraph which says that the "judgment shall constitute a *final determination of the obligation of the United States to deliver water.*" (Emphasis supplied.) There is no provision in any subsequent contract which increases the government's duties in the event of a shortage to include forecasting. Thus, after examining the four corners of the consent decree, this court can discern no obligation to project the TWSA accurately. All that is evident is an undertaking by the government to deliver water to various water owners.

Looking to the aids of contract construction, we find nothing in the history surrounding the formation of the contract which buttresses appellants' characterization of the decree. The 1945 consent decree was entered ending a suit for declaratory judgment to determine the obligation of the Bureau to deliver water to the Sunnyside irrigation district and to determine the respective water rights of all the users of the Yakima River. The case was settled following the decision of *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir. 1943), where the court held that the water users had property rights and that the Bureau was obligated to distribute the available water according to priorities established under State of Washington law. Considering this litigation history from which the "contract" arose, we note that at the time of contract formation, only the government's obligation to deliver the Yakima River water and the farmers' respective property rights to that water were at issue. There is nothing surrounding the contract

formation which suggests that the government sought to expand the issues resolved in the decree beyond those which were the subject of the litigation. We also note that prior to the entrance of the decree, indeed prior to 1977, the government had never computed a TWSA nor projected any allocations of water in times of shortage. Thus there is nothing in the circumstances surrounding the entrance of the decree or in any custom or usage to suggest that the decree was formalizing any prior act or obligation of the government to forecast the TWSA. Construing the consent decree as a contract, as we must for enforcement purposes, we find that at the time of contract formation the parties did not intend to obligate the Bureau to forecast accurately the TWSA. Such an obligation cannot now be added by this court. (We also have considered appellants' brief argument that the February TWSA estimate amounted to an anticipatory breach of the consent decree; we find this argument unpersuasive.)

Appellants also assert that the government's obligation is founded upon an implied-in-fact contract, and that this issue, which is premised upon disputed facts proving the intent of the parties to contract, should have been reserved for trial. We agree with the Claims Court's determination that summary judgment was appropriate in this instance. We can assume that the Claims Court has jurisdiction over implied-in-fact contracts, as it has held. *Pacific Gas & Electric Co. v. United States,* 3 Cl. Ct. 329, 338 (1983). To prove that an implied-in-fact contract exists, claimants bear the burden they had to bear in the former Court of Claims. They have to show mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual authority to bind the government in contract. *See generally City of Alexandria v. United States,* 737 F.2d 1022 (Fed. Cir. 1984); *Cutler-Hammer v. United States,* 441 F.2d 1179, 1182 (Ct. Cl. 1971) (the contract "must be stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention"). Appellants contend that the authority to make a contract to forecast the TWSA accurately can be found in the consent decree to which the government is a signatory. Appellant has not asserted a basis showing any government agent's authority to obligate the government to potential liability

for faulty projections of the TWSA separate from the consent decree. Having considered the decree under the rules of contract construction, we have found that no term exists in the decree. Since the government signed only that decree, its authority to bind itself flows only to that decree and only to that which is agreed within the decree. The party moving for summary judgment has the burden of proving that no genuine issue of material fact exists. Where, as here, the moving party meets that burden, the nonmoving party must show that an issue of material fact does exist. ("[A]lthough the moving party be unaided by any presumption, when he has clearly established certain facts the particular circumstances of the case may cast a duty to go forward with controverting facts upon the opposing party, so that his failure to discharge this duty will entitle the movant to summary judgment." 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.15[3] (2d ed. 1984).) Here the government met its burden; appellants did not.

Appellants' claims, arising from a predicted natural disaster that did not happen, is actually the kind of governmental error which may cause heavy loss, but cannot be placed in the context of jurisdiction under the Tucker Act, 28 U.S.C. § 1491, that we must deal with here. *City of Manassas Park v. United States,* 633 F.2d 18 (Ct. Cl.), *cert. denied,* 449 U.S. 1035 (1980); *Eastport Steamship Corp. v. United States,* 372 F.2d 1002 (Ct. Cl. 1967). We are aware, and appellants correctly point out, that "an action may be maintained * * * which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract." *Bird & Sons, Inc. v. United States,* 420 F.2d 1051, 1054 (Ct. Cl. 1970) (quoting *Chain Belt Co. v. United States,* 115 F.Supp. 701, 711-12, 127 Ct. Cl. 38, 54 (1935)). Moreover, "[t]he absence of Government tort liability has not been thought to bar contractual remedies on implied-in-fact contracts, even in those cases also having elements of a tort." *Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 465 (1980). Here, however, no contractual duty exists; negligent performance of a noncontractual duty cannot be the basis of a breach of contract claim. Rather, the negligent disclosure of information by the government, when the

government had no *contractual* duty to supply such information may sound in tort. *See United States v. Neustadt,* 366 U.S. 696, 706 (1960) ("the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is * * * the traditional and commonly understood legal definition of the tort of negligent misrepresentation * * *.")

Finally, we disagree with the Claims Court's determination that appellants were not correct parties to sue under the consent decree and subsequent alleged implied contracts. It is undisputed that appellants have a property right in the water to the extent of their beneficial use thereof. *Fox v. Ickes, supra.* The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court "every action shall be prosecuted in the name of the real party in interest." Claims Court R. 17(a). Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest.

Conclusion

The judgment of the Claims Court granting appellee's motion for summary judgment is affirmed.

AFFIRMED

Appendix B

In the United States Claims Court

(February 21, 1984)

No. 113-80C

H. F. Allen Orchards, et al.

v.

The United States

No. 226-80C

Elbert B. Schinmann, et al.

v.

The United States

No. 36-81C

R. E. Redman & Sons, Inc.

v.

The United States

Contract between irrigation district and Bureau of Reclamation; implied terms; Bureau not contractually obligated to inform district members accurately of total water supply to be available for growing season; irrigation districts not mere agents of their members, and members not contract principals; members not third-party beneficiaries of districts' contracts with Bureau.

OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Miller, *Judge:*

In these three consolidated cases approximately 160 plaintiffs seek damages from the United States for breach of claimed contract obligations by the United States Bureau of Reclamation (the Bureau) to inform them accurately in February 1977 as to the total quantity of water it expected to be able to supply to them for irrigation purposes during the 1977 growing season. Plaintiffs assert that because the Bureau understated the quantity of water available it caused them to plant fewer crops than they could have

had they received accurate estimates, to their financial detriment. The government defends upon a number of grounds, including: (1) That the Bureau had no such contractual obligation; (2) that plaintiffs neither had a contract with the Bureau nor were third-party beneficiaries entitled to sue under the contracts of their irrigation districts with the Bureau; (3) that plaintiffs failed to exhaust the administrative remedies provided for in the contract between the districts and the Bureau; (4) that under the terms of such contracts the government is absolved from liability for the claimed breach; (5) that this court lacks jurisdiction because the claims sound in tort; and (6) that to the extent plaintiffs rely on the terms of a consent decree in a district court action for the meaning of the contract provisions, exclusive jurisdiction to interpret the decree is reserved by the decree to the district court.

It is determined herein that defenses (1) and (2) are valid. Accordingly, it is unnecessary to rule on the validity of the other defenses.

FACTS

Plaintiffs are both natural persons and corporations who farm in an area of eastern Washington state drained by the Yakima River. They are some of the members of ten Yakima Project irrigation districts.[1]

The Yakima Project consists of 250 miles of rivers in the Yakima Basin system. It includes six man-made or enhanced storage reservoirs with storage capacity of approximately 1,070,700 acre-feet (a.f.) of water and benefits approximately 500,000 acres of irrigated land. The Project stores, diverts, and delivers irrigation water through its Project works into the works of the various participating irrigation districts. Water is channeled from storage reservoirs and the Yakima River and its tributaries, to the head gates of the districts. The districts then channel the

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[1] Such irrigation districts are: Grandview, Granger, Kennewick, Kittitas, Outlook, Prosser, Roza, Sunnyside Valley, Yakima-Tieton and Zillah.

water into their main irrigation district canals, allocate it among their members and deliver it through their own distribution systems to the individual farms and fields. The United States is not involved in the delivery to, or the allocation of water among, or assessment of members by the districts. Individual water users within the districts are not billed by the United States but by the districts proportionately for the water used.

The Yakima Project was first authorized by the Secretary of the Interior in 1905, pursuant to the Reclamation Act of 1902, 32 Stat. 390 (now embodied throughout 43 U.S.C. ch. 12 (1976)). Although originally the Bureau contracted directly with some individual Project water users for a period of time, it now contracts with water user organizations only, usually irrigation districts organized under Washington State law. The charges made by the Bureau to the districts cover amortization of project construction costs as well as the federal government's operating and maintenance costs.

In 1939 a suit for declaratory judgment was instituted in the United States District Court for the Eastern District of Washington (*Kittitas Reclamation District v. Sunnyside Valley Irrigation District,* Civil No. 21) to determine the obligation of the Bureau to deliver water to the Sunnyside Valley Irrigation District. Thereafter, a cross-complaint was filed in the case requesting the district court to determine the respective water rights of all the users of the waters of the Yakima River and its tributaries.

During the pendency of this action, a decision was issued by the Court of Appeals for the District of Columbia which dealt with the same Yakima Reclamation Project. *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir.), *cert. denied* 320 U.S. 792 (1943). It held that under the Reclamation Act, the water rights of the irrigation districts and water users were property rights to the extent they could beneficially use the water and, accordingly, the Secretary of the Interior was barred from posting charges for water usage in order to pay for additional construction costs in excess of the construction charges authorized by statute. While the Bureau was not obligated to furnish any more water than was available, the court determined that the Bureau was obligated to distribute the

available water according to the priorities of the parties that had been established according to the law of the State of Washington.

After the decision in *Fox v. Ickes,* the parties in the Kittitas Reclamation case elected not to continue the adjudication of the issue of the actual priorities of the individual water users, but instead agreed in 1945 upon a consent decree to be entered by the United States District Court for the Eastern District of Washington. The decree set forth both the allotment of water to the various irrigation districts in normal years and a procedure for allocation of the total water supply available in times of water shortage. It defined the "Total Water Supply Available" (TWSA) as:

> That amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

Irrigation districts holding senior contract rights and others holding historically recognized rights, designated as "non-proratables", were to receive all of their decreed amounts to the extent possible from TWSA prior to those holding junior or "proratable" rights. Some districts are entirely non-proratable; others have both non-proratable and proratable rights. Plaintiffs all claim to be members of proratable districts.

After the entry of the 1945 consent decree redefining the irrigation water supply entitlements to the various districts and establishing the proratable classifications, the Bureau executed new or amended contracts with all irrigation districts within the Yakima Project. The contracts referred to the consent decree and incorporated portions of it either verbatim or by reference.

In 1977 there was a water shortage in the Yakima area because of drought and low snow pack. Precipitation averaged only about one-third of normal for several months prior to March. At the beginning of 1977, the Yakima area snow pack was only 4 percent

of normal. Although the Bureau generally puts little or no reliability on forecasts in any year until April or May, the irrigation districts, with which the Bureau had several meetings, were eager to know what the Bureau's preliminary estimate would be. Accordingly, on February 7, 1977, the Bureau issued a TWSA estimate of 1,220,000 a.f., including 860,000 a.f. of storage and 360,000 a.f. of runoff. The Bureau's TWSA forecast projected continuation of the approximately one-third of normal precipitation which it had been experiencing for several months. Under this preliminary TWSA estimate the districts would receive 100 percent of their non-proratable entitlement and 6 to 7 percent of the proratable allotment. Recognizing that more favorable precipitation had occurred in March, generating increased snow pack, on April 7, 1977, the Bureau upgraded the TWSA forecast to 1,390,000 a.f., with proratables projected to receive approximately 13 percent of their normal supply of water. Due to increased precipitation in March, April and May, greater runoff resulting from warm April temperatures, greater percentage of return flow than had been projected and diversions of water well below the usual amount at that time of the year, on May 17, 1977, the Bureau updated its TWSA estimate by approximately 350,000 a.f., to a total of approximately 1,740,000 a.f., projecting a 50 percent supply for the wholly proratable districts. By July 1, 1977, the Bureau's estimate of the TWSA made available from February to July 1, 1977 was 2,070,000 a.f., an increase of 850,000 a.f. over the February estimate. This resulted from revised findings as to return flow, smaller diversions and 500,000 a.f. added by additional precipitation, throughout the spring and summer. For the entire irrigation year the proratables received 70 percent of their normal water supply.

Plaintiffs concede that they received all of the water to which they were entitled during 1977. Their complaint is only with respect to the underestimate in February. Plaintiffs claim that the low forecast of TWSA made in February 1977 was due to the Bureau's failure to include projected excess return flow from the irrigation canals and ditches. Plaintiffs contend that the contracts between the Bureau and the various irrigation districts of which they are members obligate the Bureau to make accurate forecasts

of TWSA and that the failure to make such an accurate estimate in February 1977 was a breach of the various contracts.

Defendant denies that there was any such contractual obligation. It asserts that it made the forecast in February 1977 voluntarily as a sovereign act rather than as a contractual requirement, in order to accommodate the farmers; that the forecast did not omit any pertinent factor in estimating the TWSA; that it was as accurate as could reasonably be accomplished with the information available in February; and that the revisions thereafter were made in the light of changed circumstances.

DISCUSSION

I

After the parties had submitted their briefs in support of their cross-motions for summary judgment, on August 30, 1983, the court filed an order, which, after taking note of plaintiffs' admission in their brief that "This is not a case in which the damage was really caused by a shortage of water", stated in part as follows:

> Plaintiffs allege that defendant breached an obligation to each plaintiff to furnish a proper estimate of total water supply available. Plaintiffs are directed to file a statement containing the appropriate record references to the provisions in each contract supporting the existence of such an obligation.

In their responses plaintiffs asserted the following as the basis for their allegation:

(a) The obligation of the United States to furnish a proper estimate of total water supply available has its genesis in the consent decree of January 31, 1945, in the case of *Kittitas Reclamation District, etc. v. Sunnyside Valley Irrigation District, et al.*, (E.D. Wash., Civil Action No. 21). The decree provides that in the event the TWSA is insufficient, the Bureau is to diminish proportionately the amount of water going to each of the irrigation districts of which the plaintiffs are members.

(b) All the irrigation districts to which the plaintiffs belong are subject to the provisions of the 1945 consent decree, and in many instances the post-1945 contracts between their districts and the United States refer to the consent decree.

(c) The provisions of many of the post-1945 contracts as well as the consent decree necessarily impliedly require the government's Project officer to compute TWSA because it is essential in order to make the proper prorations to the districts.

(d) Communication of the Bureau's TWSA computations to the farmers is also an implied requirement of the consent decree and the water supply contracts, because (i) they specify that water deliveries are to commence generally in April of each irrigation season, and because (ii) the farmers must know how much water will be available to them well before April 1 so that they may be able to plan crops and acreage to be planted, the irrigation methods to be used and other crucial farming decisions. Therefore the value of the farmer's contractual right to irrigation water is conditioned upon timely notice of the amount of water to be allocated to them.

Plaintiffs' reasoning is not persuasive.

Plaintiffs fail to point to a single provision in any of the contracts wherein the Bureau expressly obligated itself or the United States to furnish to plaintiffs any advance estimate or forecast of the total water supply available for irrigation purposes during the entire growing season.

Contracts are, of course, the expressions of mutual intent and agreement, and, in the absence of any express provision therefor in these contracts, there is no basis for imputing to the United States the assumption of an obligation not merely to make such forecasts but to do so with accuracy or else subject itself to liability for large sums in damages.

Lacking an express promise by the government, plaintiffs argue that because such an accurate annual forecast would be valuable to the farmers a promise by the government to furnish it or pay damages should be implied. But the major obstacle to such an

argument is that there is no proof that the government ever agreed to such an obligation or ever intended to do so.

With respect to the situation where there is no written contract whatsoever between the parties, *Pacific Gas & Elec. Co. v. United States,* 3 Cl. Ct. 329, 338-39 (1983), aptly summarizes the requirements for the United States to be deemed to have entered into an implied contract as follows:

> A contract implied-in-fact requires a showing of the same mutual intent to contract as that required for an express contract. The fact that an instrument was not executed is not essential to consummation of the agreement. It is essential, however, that the acceptance of an offer be manifested by conduct that indicates assent to the proposed bargain. The requirements of mutuality of intent, and the lack of ambiguity in offer and acceptance, are the same for an implied-in-fact contract as for an express contract; only the nature of the evidence differs. The officer whose conduct is relied upon must have had actual authority to bind the Government in contract. It is plaintiff's burden to prove that an implied-in-fact contract was made. Extensive negotiations in which the parties demonstrate hope and intent to reach an agreement are not sufficient in themselves to establish a contract implied-in-fact. [Citations omitted.]

And *see also Baltimore & Ohio R.R. v. United States,* 261 U.S. 592, 597 (1923); *Porter v. United States,* 204 Ct. Cl. 355, 365, 496 F.2d 583, 590 (1974), *cert. denied,* 420 U.S. 1004 (1975); and *Prevado Village Partnership v. United States,* 3 Cl. Ct. 219, 223-24 (1983).

Plaintiffs' burden of establishing an implied promise is all the more difficult where the parties contemplate that their contractual relationship arises by means of a written agreement. As one authority states:

> Only the least thought is necessary to realize that a "gap" in an agreement should not be filled merely because a gap exists. * * * A promise that is not there in language, or an unexpressed condition of an express promise, should be put

> in by process of implication only when the conduct of the parties reasonably interpreted already has expressed it.

(3 *A. Corbin on Contracts,* § 569, at 341 (1960).)

The pertinent case law on implied promises is similarly summarized in 17 Am. Jur. 2d, *Contracts,* § 255, at 651-52 (1964):

> where a contract is reduced to writing, it is generally held, in the absence of mistake or fraud, that the written contract includes or embodies the whole agreement of the parties and all material provisions, and that, therefore, no additional agreements, obligations, or warranties can be implied. If there is to be any implication, it must result from the language employed in the instrument or be indispensable to carry the intention of the parties into effect. Terms are to be implied in a contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because of sheer inadvertence or because they are too obvious to need expression. Insofar as it indicates anything, the absence of a particular provision from a contract indicates an intention to exclude it rather than intention to include it. No implied obligation can exist under a contract upon a point which it is apparent was not in the minds of the parties when the contract was executed, and nothing can be implied from a contract which could not have been lawfully expressed therein.

And *see also Somerville Technical Services v. United States,* 226 Ct. Cl. 291, 300, 640 F.2d 1276, 1281 (1981); *Somali Development Bank v. United States,* 205 Ct. Cl. 741, 751, 508 F.2d 817, 822 (1974); *Hudson Canal Co. v. Penna. Coal Co.,* 75 U.S. (8 Wall) 276 (1868); *Danciger Oil & Ref. Co. of Texas v. Powell,* 137 Tex. 484, 154 S.W. 2d 632 (1941); *Ives v. City of Willimantic,* 121 Conn. 408, 185 A. 427 (1936); and *Domeyer v. O'Connell,* 364 Ill. 467, 4 N.E. 2d 830 (1936).

Plaintiffs have failed to supply any factual predicate from which it may be concluded that the Bureau impliedly obligated itself to make such advance estimates or forecasts. Periodic

computation of the TWSA may be necessary to enable the Bureau to make the proper prorations of the water among the irrigation districts as it becomes available. But plaintiffs have not demonstrated any discernible need for an advance estimate or forecast for the whole growing season in order to enable the Bureau to distribute the water properly. Nor have plaintiffs demonstrated any other reason why the Bureau would have been willing to obligate itself to make such a forecast on pain of liability for damages if it is mistaken or inaccurate.

Finally, even if such a promise could be implied, it would not be binding on the government, since plaintiffs have failed to show that any government officer had authority to obligate the United States to an agreement to make accurate advance forecasts of the total water which would be available for the growing season in the Yakima River basin or to pay damages for its breach. The authority of the Secretary of the Interior to enter into contracts with state irrigation districts for payment of charges is contained in 43 U.S.C. §§ 511-26 (1976). Nowhere do these sections authorize the Secretary or his delegate to bind the government to the making of accurate annual advance forecasts of the total water to be made available for the growing season.

The officer whose promise is relied upon by plaintiffs must have had actual authority to bind the government to that promise. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947); *Schweiker v. Hansen,* 450 U.S. 785, 788-89 (1981); *Haight v. United States,* 209 Ct. Cl. 698, 538 F.2d 346, *cert. denied,* 429 U.S. 841 (1976). "The claimant for money damages for breach of an express or implied in fact contract must show that the officer who supposedly made the contract had authority to obligate appropriated funds." *Kania v. United States,* 227 Ct. Cl. 458, 465, 650 F.2d 264, 268, *cert. denied,* 454 U.S. 895 (1981). It is a "time-honored principle that the Federal Government is not bound by its agent acting beyond his authority * * * ." *National Bank of South Carolina v. United States,* 223 Ct. Cl. 573, 577, 621 F.2d 1109, 1111 (1980).

II

Assuming that the irrigation contracts could be construed to provide for the making of the advance estimates, plaintiffs would still not be entitled to recover herein, because the contracts give them no enforceable rights against the United States. Even where a person receives a substantial financial benefit from the government's performance of a contract, he is not entitled to recover for its breach absent a showing that he has privity of contract with the United States or that he is a direct third-party beneficiary of such contract. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550-51 (Fed. Cir. 1983); *Somerville Technical Services v. United States, supra*, 226 Ct. Cl. at 301, 640 F.2d at 1282; *Housing Corp. of America v. United States*, 199 Ct. Cl. 705, 712-13, 468 F.2d 922, 925-26 (1972); *D. R. Smalley & Sons, Inc. v. United States*, 178 Ct. Cl. 593, 372 F.2d 505, *cert. denied*, 389 U.S. 835 (1967). The contracts upon which plaintiffs rely are contracts between the United States and the irrigation districts of which plaintiffs are only some of the members, not between the United States and plaintiffs. Hence there is no privity between the plaintiffs and the United States.

Plaintiffs contend that they are actually the principals and that the irrigation districts are merely their agents in the contracts with the United States. But for this to be true, the districts would have to be *mere* agents; agree with the principals to follow their directions exclusively; own no property of their own; and have no authority to make independent decisions through their own officers. *See National Carbide Corp. v. Commissioner*, 336 U.S. 422 (1949); *Moline Properties, Inc. v. Commissioner*, 319 U.S. 436 (1943); and *Vaughn v. United States*, 3 Cl. Ct. 316 (1983).

There is little or nothing in the record which can support such a scenario. It is well established that irrigation districts are public corporations or local governmental units organized under authority of state statutes for the purpose of appropriating, regulating, controlling, and distributing water for irrigation, by the owners of the land to be irrigated. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); and *see Salyer Land Co. v. Tulare Water*

District, 410 U.S. 719, 723 (1973); and 3 *C. Kinney on Irrigation and Water Rights*, § 1404 (2d ed. 1916).

In the State of Washington the organization of an irrigation district is strictly controlled by state law (Wash. Rev. Code Ann. § 87.03.030 (1962)). It requires the county commissioners to supervise the election and approval by two-thirds of the qualified landholders in the proposed district (§ 87.03.035-050). It is operated by a board of directors elected by the landholders, who in turn elect the officers (§ 87.03.115). The board is granted the usual powers to make contracts and all necessary rules and regulations for the conduct of the affairs of the district (§ 87.03.115). It is also given the power to acquire, "either by purchase or condemnation, or other legal means, all lands, and waters, water rights, and other property necessary" for irrigation projects (§ 87.03.140). Money may be borrowed and bonds issued for the payment of the same upon approval of the voters (§ 87.03.200). All of the real property in the district may be assessed for the purposes of the district (§ 87.03.240). The boundaries of the district may be changed and lands added or excluded (§ 87.03.555-03.695). A district is specifically authorized "To construct, repair, purchase, maintain or lease a system for the sale or lease of water to the owners of irrigated lands within the district for domestic purposes" and "To assume, as principal or guarantor, any indebtedness to the United States under the federal reclamation laws, on account of district lands" (§ 87.03.015).

Title 43 U.S.C. §§ 511 and 523 (1976) authorize the Secretary of the Interior to contract with such legally authorized irrigation districts for the impounding, storage, distribution and delivery of water to such districts in return for payments by the districts for the construction and maintenance of reservoirs, irrigation works, canals and distribution systems. Section 423(e) prohibits the delivery of water upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract in a form approved by the Secretary shall have been made with an irrigation district providing for payment by the district of the cost of constructing, operating and maintaining the works during the

time they are in control of the United States. All of the contracts at issue were entered into or amended after 1926, and plaintiffs do not contend that they are not subject to § 423. Thus, plaintiffs have failed to demonstrate that the Secretary of the Interior or his delegate was even authorized to contract with the individual plaintiffs as principals, let alone intended to do so.

Moreover, the contracts themselves are entirely inconsistent with any such theory. There is no evidence of any agreements between the members or water users and the irrigation districts that the latter are to act as mere agents of the former. Each contract is executed by the irrigation district in its own name and specifically designated as a contract between the United States and the district. In each contract the United States agrees to deliver water to the irrigation district, and it is the latter which has the responsibility for the allocation and distribution of the water to the members of the district. In turn the district agrees to repay the United States periodically and in installments for the government's construction of its reservoirs, dams and irrigation works and its operating and maintenance costs in connection with the water supply, distribution and delivery systems. The method of allocation and distribution of the water to the individual users is not provided for in the contract, but is the responsibility of the district. While, of course, the district obtains its funds from its members or water users, there is no necessary correlation between the amounts paid the United States and the amounts assessed by the district or levied against the users, since the district may also have its own operating and maintenance cost. Furthermore, in each of the contracts there is a clause which in substance states the following: "Nothing in this contract shall be deemed to relieve the District in any way of its general obligation to pay the United States the full amount owed to the United States hereunder, regardless of delinquencies in payment of assessments and charges by the landowner to the District."[2]

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[2] From contract between the United States and the Prosser Irrigation District, executed November 25, 1949, par. 24.

Plaintiffs claim that they are principals and the irrigation districts mere agents because the contracts recite that the district is "the duly authorized representative" of the user. However, even if this could be equated to "agent", it would not control over the substance of the contracts. Fair analysis of the contracts requires the conclusion that the irrigation districts are representatives of the water users only in the sense that municipal corporations generally represent the residents of a municipality or membership corporations represent their members.

Plaintiffs' claim that they are entitled to sue the United States as third-party beneficiaries of the contracts between the government and the irrigation districts is also meritless. While this court has jurisdiction of a suit on a contract by an intended third-party beneficiary of the contract (*Hebah v. United States,* 192 Ct. Cl. 785, 792, 428 F.2d 1334, 1339 (1970)), an individual who is not a party to an agreement does not have the right to sue for breach of that agreement merely because he would benefit from its performance or because it would be beneficial to him to have the right. *German Alliance Ins. Co. v. Home Water Supply Co.,* 226 U.S. 220, 230 (1912); *Robo Wash, Inc. v. United States,* 223 Ct. Cl. 693, 697-98 (1980); *Ables v. United States,* 2 Ct. Cl. 494, 500 (1983), *aff'd,* ___ F.2d ___ (Fed. Cir. Jan. 17, 1984). And *see also* 4 *A. Corbin on Contracts,* § 775, at 8 (1951) and 17 Am. Jur. 2d, *Contracts,* § 304.

Plaintiffs' claim is based on nothing more than the reasoning that, because the contracts for the orderly distribution of water by the United States to the districts were designed to enable the districts to make sub-distributions to their members, the individual members are the ultimate beneficiaries of the contracts, and hence each is entitled to sue the United States individually for any breach of the contract between the district and the United States.

The major fallacy in the plaintiffs' reasoning is that it ignores the fact that in incorporating the districts to contract in behalf of their members collectively with respect to their water rights, the members exchanged their rights to enforce and protect their individual interests for interests in the public corporations, in the

same way that members or shareholders generally do when they combine their interests in to membership or business corporations. Most corporate contracts are entered into for the benefit of their members or shareholders, but if for that reason alone each member was entitled to sue individually for an alleged breach affecting all, irrespective of whether the corporation or a majority of the members thought there was such a breach, it would authorize multitudinous litigation and be destructive of the conception of the corporation as an entity separate from its members or shareholders

Members or shareholders are not *per se* excluded from being third-party beneficiaries of corporate contracts entitled to enforce their individual rights against promisors. But obviously more than the mere inuring of benefit from performance is required for them to be entitled to do so. There must be some manifestation of intent between the parties to the contract that if the promisor defaults the members or shareholders will be compensated directly by the promisor. W. Fletcher, *Cyclopedia of the Law of Private Corporations,* §§ 5911, 5923 (rev. perm. ed. (1980) and 1983 Supp.). *Schaffer v. Universal Rundle Corp.,* 397 F.2d 893, 896 (5th Cir. 1968); *Robo Wash, Inc. v. United States,* 223 Ct. Cl. 693, 697 (1980); *Howell v. Fisher,* 49 N.C. App. 488, 272 S.E. 2d 19 (1980), *pet. for review denied,* 302 N.C. 218, 277 S.E. 2d 69 (1981); *Sutter v. General Petroleum Corp.,* 28 Cal. 2d 525, 170 P 2d 898 (1946).

This rule is given particular emphasis where the claimed third-party beneficiary is asserting his right as one of many members or inhabitants of a governmental entity, such as the United States, a state, a municipality, or an irrigation district as is here involved. As is pointed out in Calamari & Perillo on Contracts, § 247 (at 387 (1970)) "Every contract made by a governmental unit is made for the benefit of its inhabitants. If a city contracts to have a police station, firehouse, tax office or park built, it does so to enhance the general welfare and, thus, to benefit the public. Yet, in such a case, no individual inhabitant has a right to enforce the contract on his own behalf." Accordingly, it is only where the contact between the public corporation and the promisor

manifests the specific intent to give the individual an enforceable right to compensation for its breach that he may sue thereon.

The leading case with respect to this rule is *German Alliance Ins. Co. v. Home Water Supply*, 226 U.S. 220 (1912). There an insurance company as assignee of the owner of a number of houses, brought suit against a water company for losses caused by a fire which it claimed were attributable to the water company's failure to comply with its contract with the city of Spartanburg to furnish adequate water supplies and pressure for city fire hydrants. In denying the right of the plaintiff to sue as a third-party beneficiary of the city's contract with the water company, the court explained (226 U.S. at 230-31):

> Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit. * * *
>
> Here the city was under no obligation to furnish the manufacturing company with fire protection, * * * but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

The underlying rationale of *German Alliance Ins. Co.* was restated succinctly by Justice Cardozo, as a member of the New York Court of Appeals, in a case involving similar facts (*H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 164-65, 159 N.E. 896, 897 (1928)):

> In a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party. The benefit, as

> it is sometimes said, must be one that is not merely incidental and secondary. * * * It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost. The field of obligation would be expanded beyond reasonable limits if less than this were to be demanded as a condition of liability. * * *
>
> By the vast preponderance of authority, a contact between a city and a water company to furnish water at the city hydrants has in view a benefit to the public that is incidental rather than immediate, an assumption of duty to the city and not to its inhabitants.[3]

The American Law Institute's *Restatement of the Law Contracts, Second* (1981), codifies this rule as follows:

> § 313. Government Contracts
>
> * * * *
>
> (2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless
>
> (a) the terms of the promise provide for such liability; or
>
> (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.
>
> Comment:

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[3] For other cases following the majority rule that private citizens may not bring a breach of contract action against a water company for a loss by fire because of the water company's failure to perform its contract with a municipality to furnish an adequate supply of water, *see* 78 Am. Jur. 2d, *Waterworks and Water Companies*, § 51 (at 938-39 (1975)).

> *a. Rationale.* * * * Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested. In case of doubt, a promise to do an act for or render a service to the public does not have the effect of a promise to pay consequential damages to individual members of the public unless the conditions of Subsection (2)(b) are met.[4]

Recent cases applying the same rule include *Miree v. United States,* 538 F.2d 643 (5th Cir. 1976), *per curiam on rehearing en banc,* adopting the dissenting opinion of Judge Dyer in the same case at 526 F.2d 679, 686-88 and *Miree v. United States,* 242 Ga. 126, 249 S.E.2d 573 (1978) (Persons suffering injury in an airplane accident at a county operated airport not entitled to sue the county for breach of a contract between the county and the Federal Aviation Administration to operate the airport safely, because the contract did not manifest an intention that members

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[4] The original *Restatement of the Law Contracts* (1932) is similar. It provides:

> § 145. Beneficiaries Under Promises To The United States, A State, Or A Municipality.
>
> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or
>
> (b) the promisor's contract is with a municipality to render services the non-performace of which would subject the municipality to a duty to pay damages to those injured thereby.

of the public be compensated);[5] *Commonwealth of Pa. v. National Ass'n of Flood Ins.*, 378 F.Supp. 1339 (M. D. Pa. 1974), *aff'd in part and rev'd in part*, 520 F.2d 11 (3rd Cir. 1975), and *Schell v. National v. National Flood Insurers Ass'n*, 520 F. Supp. 150 (D. Colo. 1981) (Contract between Secretary of Housing and Urban Development and insurers provided no basis for suit by third-parties against latter for breach of duty to publicize availability of flood insurance, because of absence of manifestation of intent to compensate or to be liable to members of public for breach of any such duty); *Martinez v. Socoma Companies, Inc.*, 11 Cal. 3rd 394, 521 P.2d 841 (1974) (Persons certified by federal government as disadvantaged not entitled to sue corporation for breach of contract with United States to provide job training and employment to such class of persons, because the contracts manifested no intent that defendant compensate plaintiffs or other members of public for nonperformance): *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E.2d 481 (1974) (Plaintiff suing city for wrongful death of minor caused by accumulation of ice on a bridge not entitled to recover under city's contract with state to maintain the state highway system because of absence of specific intent to make plaintiff third-party beneficiary of such contract); *Davis v. Nelson-Deppe, Inc.*, 91

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[5] After the decision of the 5th Circuit in *Miree*, at 538 F.2d 643, the Supreme Court vacated the judgment and remanded the case to the court of appeals for consideration of the claim under Georgia law rather than federal common law, for lack of a federal interest in the case. *Miree v. Dekalb County*, 433 U.S. 25 (1977). On remand the court of appeals certified the question of state law to the Georgia Supreme Court. *Miree v. United States*, 565 F.2d 1354 (5th Cir. 1978). The latter then held that under Georgia law likewise the mere fact that a member of the public would have benefited from the performance of the contracts does not create third-party intended beneficiary status, and that there was no intention manifested in the contracts that the country compensate any member of the public for injurious consequences. *Miree v. United States*, 242 Ga. 126, 249 S.E.2d 573 (1978). Thereupon the court of appeals affirmed the decision of the district court dismissing the plaintiffs' suit against the county. 588 F.2d 453 (5th Cir. 1979).

Idaho 463, 424 P.2d 733 (1967) (Truck owner could not maintain contract action as third-party beneficiary for damages to equipment which went off a highway being reconstructed by defendant under contract with state highway department, because of absence of third-party beneficiary intent in contract); *United Dispatch v. E. J. Albrecht Co.*, 135 W.Va. 34, 62 S.E. 2d 289 (1950) (Building owner not entitled to recover for damage to building as third-party beneficiary of defendant's contract with United States for construction of concrete wall and levee along river bank for flood protection to city, absent evidence of specific intent).

For a variety of reasons it is perfectly clear that in entering into the irrigation contracts neither the United States nor the irrigation districts intended that an individual member of the district be entitled to maintain an action against the United States for a breach.

First, there is no express provision in any of the contracts manifesting any such intent.

Second, 43 U.S.C. § 423(e)(1976) provides that every federal contract for the delivery of water must be made with an irrigation district organized under state law. Thus no officer had authority on behalf of the United States to contract with an individual member of such a district. What the federal officers have not been authorized to do directly they may not be deemed to have been authorized to accomplish indirectly by making district members third-party beneficiaries entitled to enforce the contracts on their own behalf. *United States v. National Surety Corp.*, 309 U.S. 165 (1940); *Ables v. United States*, 2 Cl. Ct. 494, 501 (1983), *aff'd*, __ F.2d __ (Fed. Cir. Jan. 17, 1984); *Frangella Mushroom Farms, Inc. v. United States*, 229 Ct. Cl. 578, 582 (1981), *cert. denied*, 456 U.S. 916 (1982).

Third, the various contracts contain a clause making the Secretary of the Interior arbiter of disputes between the parties arising out of the contract involving questions of fact, and his

decision is to be conclusive as against the parties.[6] The contracting parties could hardly have intended that the irrigation district be subject to such clause while at the same time any member or the district may disregard it by asserting the same claim as a third-party beneficiary.

Fourth, the contracts contain an exculpatory clause, holding the United States harmless from liability for damages arising by reason of shortages in irrigation water resulting from distribution or any other causes.[7] To allow a member of a district to circumvent this restriction on the district by bringing suit in his own name would also be inconsistent with the intent of the signatories to the contract.

Fifth, absent an express provision entitling a third person not a party to a contract to enforce the provisions of the contract on his

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[6] The Amendatory Contract between the United States and the Prosser Irrigation District contains the following typical provision:

Secretary Arbiter of Disputes Involving Questions of Fact

44. In the event of disputes between the parties hereto arising out of this contract involving questions of fact, and, so far as the provisions hereof require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions and as the one required to make such determination of facts and his decision thereon shall be conclusive as against the parties hereto.

[7] The same Prosser contract sets forth the following typical clause:

33. No liability shall accrue against the United States or any of its officers, agents or employees for damage, direct or indirect, arising by reason of shortages in the quantity of water available through the irrigation system or interruptions in water deliveries to lands in the District resulting from drought, inaccuracy in distribution, hostile diversion, prior or superior claims, accident to or failure of facilities of the irrigation system, whether or not attributable to negligence of officers, agents or employees of the United States, or other causes of whatsoever kind. Nor shall the District's obligations to the United States under this contract be reduced by reason of such shortages or interruptions. In the event of such shortages or interruptions, the United States will, however, make every reasonable effort to remove promptly the cause thereof.

own behalf, in determining whether or not it could reasonably have been implied it is fair to consider the consequences of such an implied provision. It would subject the United States to the cost of defending multitudinous individual suits of varying natures with different measures and allocations of damages.[8] Moreover, it would allow individual members to assert claims for breach of contract which the contracting districts themselves and a majority of their members do not believe are proper. It is noteworthy that not a single district has joined in or otherwise supported plaintiffs' claims herein.[9] These are consequences which Congress obviously sought to avoid by the enactment of 43 U.S.C. § 423(e).

Conclusion

The pleadings, depositions, affidavits, admissions and other documents in the record show that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. Accordingly, plaintiffs' motions for summary judgment are denied. Defendant's cross-motions for summary judgment are allowed. It is ordered that judgments be entered dismissing the complaints, with costs to be awarded to defendant.

/s/ PHILIP R. MILLER
Philip R. Miller, Judge

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[8] Plaintiffs do not state how many members or water users the ten irrigation districts have, but defendant asserts and plaintiffs do not deny that there are many thousands. Plaintiffs concede that they are a minority in each of the districts since they have been unable to persuade any district to bring suit on the same claim.

[9] *Cf. United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1549 (Fed. Cir. 1983): "If direct access were allowed to all Government subcontractors, contracting officers might, without appropriate safeguards, be presented with numerous frivolous claims that the prime contractor would not have sponsored."

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-937
113-80C
226-80C
36-81C

H. F. Allen Orchards, et al.,
Elbert B. Schinmann, et al.,
R. E. Redamn & Sons, Inc.,
Appellants,

v.

The United States,
Appellee.

JUDGMENT

ON APPEAL from the U. S. Claims Court

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

Dated: December 10, 1984.
Petition for Rehearing,
Denied, January 30, 1985.

Entered by Order of the Court

George E. Hutchinson, Clerk

/s/ GEORGE E. HUTCHINSON
Clerk

Issued as a Mandate: February 21, 1985.

United States Court of Appeals
for the Federal Circuit

No.84-937

H. F. Allen Orchards, et al.,
Elbert B. Schinmann, et al.,
R. E. Redman & Sons, Inc.,
Appellants,

v.

The United States,
Appellee.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

For the court:

/s/ GEORGE E. HUTCHINSON,
George E. Hutchinson, Clerk

January 30, 1985
Date

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Date: December 21, 1984
Appeal No. 84-937, H.F. Allen Orchards, et al.
v. The United States

Dear Mr. Goldstein:

Pursuant to motion, the time to file the following paper has been extended to and including January 18, 1985.

( ) Brief/Appendix for Appellant/Petitioner

( ) Brief for Appellee/Respondent

( ) Brief for Amicus Curiae

( ) Reply Brief

(X) Petition for Rehearing for Appellants

( )

For The Court

George E. Hutchinson, Clerk

/s/ELIZABETH J. CARROLL
By Elizabeth J. Carroll
Deputy Clerk

Appendix D

LIST OF PETITIONERS

The Petitioners in this proceeding, and the reclamation districts to which they belong are:

H.F. Allen Orchards, et al. v. United States, United States Claims Court No. 113-80C.

Petitioners	Irrigation District
H.F. Allen Orchards	Yakima—Tieton
Bruce D. Allen	Yakima—Tieton
Jean D. Allen	Yakima—Tieton
Lew Judd Allsop	Roza
Kathryn Allsop	Roza
Carl Allwardt	Roza
Mona Allwardt	Roza
B 3 Enterprises, Inc.	Sunnyside and Roza
B 3, Inc./Willard Farms	Sunhaven Farms
Billie Balch	Roza and Wapato
Dennis N. Balch	Wapato
Marjorie Balch	Wapato
W.E. Balch, Jr.	Roza and Wapato
Claude C. Bartsma	Kittitas
Shirley Bartsma	Kittitas
Courtney R. Baze	Roza
Gwendolyn Baze	Roza
Kay Becker	Roza and Sunnyside Valley
Otto Becker	Roza and Sunnyside Valley
Max Benitz	Sunhaven Farms
Benton City Mint Farms, Inc.	Roza and Kennewick
Neil Bisyak	Kittitas
Blazing Tree Ranches	Kittitas
Claudia Bouchey	Wapato
Delmar E. Bouchey and Steven Bouchey, a partnership	Wapato
Delmar E. Bouchey	Wapato
Leona Bouchey	Wapato
Steven Bouchey	Wapato
Arnold O. Brulotte	Roza
Alice P. Brulotte	Roza
Bennett G. Brulotte	Roza
Tracey Brulotte	Roza

Petitioners	Irrigation District
Brulotte Farms (a partnership)	Wapato
Rosalie M. Brulotte (individually and as personal representative of Roland E. Brulotte, deceased)	Wapato
Richard D. Brulotte	Wapato
Ronald L. Brulotte	Wapato
Burkholder Farms, Inc.	Roza
Cameron Bros. Ranch	Roza
Kathy Cameron	Roza
Sam B. Cameron	Roza
Virgil F. Cameron	Roza
Carp-Land Co., a partnership	Roza
Betty Jo Carpenter	Roza
Thomas Carpenter	Roza
Carpenter Improvement District	Roza
Thomas Carpenter, Jr.	Roza
Violet I. Carpenter	Roza
Charron Company, Inc.	Roza
Edith Charron	Roza
Sebastian Charron	Roza
Jean Chott	Roza
Joseph J. Chott	Roza
Fred Christen, D.D.S. and Neil Bisyak, a partnership	Kittitas
Fred Christen	Kittitas
Donald A. Clark	Roza
Kathleen Clark	Roza
Thad Coleman	formerly Horn Rapids
Olive Coleman	formerly Horn Rapids
Collins Farms	Roza
Helen Collins	Roza
Leonard E. Collins	Roza
Theodore L. Collins	Roza
Anna Conner	Wapato
Gene V. Conner	Wapato
Crawford Farms	Roza
Earl Crawford & Sons, Inc., a partnership	Roza
Earl W. Crawford & Sons, Inc.	Roza
Benton Crawford	Roza
Edward Crawford	Roza
Evelyn Crawford	Roza
Janet Crawford	Roza

Petitioners	Irrigation District
Blaine Crea	Roza
Judy Crea	Roza
Della Mae Currier	Roza
William H. Currier	Roza
Delmar S. Day	Roza
Joyce Day	Roza
Wesley J. DenBeste	Roza
Cleta DenBeste	Roza
Barbara A. Dills	Sunnyside Valley
Clifford T. Dills	Sunnyside Valley
Drake Land & Cattle Co.	Roza
Kathryn O. Drake	Roza
Robert J. Drake	Roza
Robert J. Drake, Jr.	Rosa
Frank B. Dreyer	Roza
Margaret Dreyer	Roza
Conrad B. DuFault	Roza
Margaret M. DuFault	Roza
Jewell W. Duggins	Roza
Pat M. Duggins	Roza
Garrett W. Duim	Roza
Marie E. Duim	Roza
Frank Dunham	Kennewick
Durfey Farms	Roza and Sunnyside
James Durfey	Roza and Sunnyside
James Durfey, Jr.	Roza and Sunnyside
Judy Durfey	Roza and Sunnyside
Louise Durfey	Roza and Sunnyside
Ted Durfey	Roza and Sunnyside
Shirley Eberle	Roza and Prosser
T. Marvin Eberle	Roza and Prosser
Elizabeth Farms, Inc.	Roza and Sunnyside
Glenna Mae Enquist	Roza
Bonnie Euteneier	Roza
Max W. Euteneier	Roza
Linda L. Everts	Roza—Union Gap
Ronald W. Everts	Roza—Union Gap
Farwestern Farms, Inc.	Wapato
Donald Faucher	Wapato Project
Mable Faucher	Wapato Project
Forrest Johnson Orchards, Inc.	Roza
Barbara Foster	Kennewick
Marvin F. Foster	Kennewick

Petitioners	Irrigation District
Nicholas J. Friend	Sunnyside Valley
Norma Jean Friend	Sunnyside Valley
Leo Gasseling & Sons, Inc.	Wapato
Harry B. Gay, Jr.	Roza and Wapato Project
Marian L. Gay	Roza and Wapato Project
Gordon A. Geffe	USIS—Wapato Project
Kay E. Geffe	USIS—Wapato Project
Ben F. George	Kittitas
Nina George	Kittitas
Goldcrest Orchards, Inc.	Roza
Golob & Sons, Inc.	Sunnyside Valley
Jocelyn L. Goodwin	Roza
Quentin G. Goodwin	Roza
Green Acre Farms, Inc.	Wapato
Dorothy Groszhans	Wapato
Mark Groszhans	Wapato
Hata Orchards	Wapato
Carmen M. Hata	Wapato
Gilbert Dean Hata	Wapato
Yoshio Hata	Wapato
Glenn F. Hata	Wapato
Hattrup Farms, Inc.	Roza
Warren E. Hazen	Roza
E.T. Hearron Company, Inc.	Roza
Charlotte E. Hensley	Roza
Porter J. Hensley	Roza
Sally Hitchcock	Roza
Joe W. Hobbs	Kittitas
Nedra M. Hobbs	Kittitas
Barbara C. Hope	Roza—Sunnyside Valley
Linden J. Hope	Roza—Sunnyside Valley
Houghton Farms	Roza
Lois H. Catterall	Roza
Robert W. Catterall	Roza
Ken Inaba	Wapato
Shiz Inaba	Wapato
Everett Irish	Kittitas
Margaret Irish	Kittitas
Grace Jio	Wapato Project
Masateru Jio	Wapato Project
Elizabeth C. Johnson, individually and as Executrix of the Estate of Lawrence W. Johnson, deceased	Roza

Petitioners	Irrigation District
Vivian T. Johnson	Roza
Jones Building Co.	Roza
Kendall Farms, Inc.	Roza
Alan R. Klebaum	Wapato Project
Eileen F. Klebaum	Wapato Project
Harvey Krueger	North Prosser
Ruth F. Krueger	North Prosser
Masuo Kuribayashi	Wapato
Sue Kuribayashi	Wapato
Phyllis Leach	Roza
Robert H. Leach	Roza
Leiske & Son Orchards, a partnership	Sunnyside
Leiske & Son Orchards, Inc.	Sunnyside
Erma E. Leiske	Sunnyside
Marilyn Leiske	Sunnyside
Rodney J. Leiske	Sunnyside
Tilman J. Leiske	Sunnyside
Henry R. Lenz	Roza
Madeline D. Lenz	Roza
Dall W. Leonard	Roza
Walter O. Leonard	Roza
Level Best, Inc.	Kittitas
Donald W. Lewis	Roza
Elizabeth E. Lewis	Roza
Kenneth E. Lewis	Roza
Nancy Lewis	Roza
Lombard Loop Ranches	Roza
Double M. Ranch	Roza
Fred H. Mahre	Roza
Helen L. Mahre	Roza
Norma A. Marquard	Roza—Sunnyside Valley
Richard L. Marquard	Roza—Sunnyside Valley
Arnold Lee Martin	Roza
Eileen M. Martin	Roza
Marcia L. Martin	Roza
Robert J. Martin	Roza
Elizabeth H. McCune	Kittitas
Stanley McCune	Kittitas
Medina Land Co.	Roza
Frank R. Meyer	Wapato
Miller Ranches	Roza
James C. Miller	Roza
Kathleen Miller	Roza

Petitioners	Irrigation District
Monarch Ranch	Kennewick
Joanne Mare Nashem	Roza
G. Jay Nelson	Kittitas
Joan Elizabeth Nelson	Kittitas
Newport, Inc.	Roza
Nickoloff Orchards, Inc.	Wapato
Ann Niesz	Wapato
Earl Niesz	Wapato
Fred Niesz	Wapato
Vivian Niesz	Wapato
Ruth Nishi	Wapato
Sam Nishi	Wapato
Yasuo Nishi	Wapato
Northwest Building Co.	Roza
Oasis Farms, Inc.	Roza
George M. Oldfield	Roza
Theresa Oldfield	Roza
Caroline Onstot	Kittitas
Frank G. Onstot	Kittitas
Pacific Coast Nursery	—
Patnode Hops, Inc.	Grandview
Judith Pierce (aka Judith Finkbeiner)	Kittitas
Neil Pierce	Kittitas
Arthur L. Pittillo	Roza
Pleasant Acres, Inc.	Roza
Betsy Porter	Roza and Sunnyside
Donald E. Porter	Roza and Sunnyside
Paul Porter	Roza and Sunnyside
Robin Porter	Roza and Sunnyside
Bill G. Prater	Kittitas
Vida Prater	Kittitas
Frances J. Puterbaugh	Sunnyside
Martin R. Puterbaugh	Sunnyside
Ralph E. Randall	Wapato
Lucille H. Rasmussen	Wapato
Robert A. Rasmussen	Wapato
Rattlesnake Ranch	Roza
Roskamp Farming Co., Inc.	Roza and Sunnyside Valley
C. William Ross	Kittitas
Helen Marie Ross	Kittitas
Stanley A. Roy	Roza
Susan Roy	Roza

Petitioners	Irrigation District
Helen Gene Sabin	Kittitas
Paul R. Sabin	Kittitas
Nancy Sauve	Wapato
Steve Sauve	Wapato
Linda Schnebly	Kittitas
Robert D. Schnebly	Kittitas
Harold S. Schrotenboer	Roza
Thelma S. Schrotenboer	Roza
Bernie E. Schutt	Sunnyside Valley
DiAnn D. Schutt	Sunnyside Valley
Fred A. Schutt	Roza and Sunnyside Valley
Hazel D. Schutt	Roza and Sunnyside Valley
John Schwab	—
Myrna Schwab	—
Donna Scymanski	Roza
Peter Scymanski, Jr.	Roza
Janet Z. Segal	—
John B. Segal	—
John W. Sell	Kittitas
Martha M. Sell	Kittitas
Evadeen Sellers	Kennewick
Thomas Sellers	Kennewick
Charlene Seymour	Roza
Nicholas J. Seymour	Roza
William V. Shelton	Kittitas
Sherandre Farms, Ltd.	Roza
Bessie R. Smith	Roza and Sunnyside Valley
William R. Smith	Roza and Sunnyside Valley
S.P. Farms, Inc.	Wapato
Spar Farm	Roza
Barbara Sparks	Roza
Norval W. Sparks	Roza
Ritz Sparks	Kittitas
Roger C. Sparks	Kittitas
Stepping P, Inc.	Sunnyside
Helen Stout	Roza
Reese O. Stout	Roza
David Strickland	Roza
Iona Strickland	Roza
Gerald F. Sybouts	Roza
Mickie S. Sybouts	Roza
John E. Syverson	Roza
Terri L. Syverson	Roza

Petitioners	Irrigation District
Emmi Toop	Roza and Sunnyside Valley
Gloria Toop	Roza
Herold Toop	Roza
Merton J. Toop	Roza and Sunnyside Valley
Barbara M. Trabant	Roza
Dan C. Trabant	Roza
Triple R. Ranches, Inc.	Roza
Gerald Trupp	Roza
Rosalee Trupp	Roza
Tudor Hills Vineyards, Inc.	Roza
Uchida Bros., Inc.	Wapato
Umemoto Farms, Inc.	Wapato
Rodney N. Van Allen	Kittitas
Tony Van Allen	Kittitas
Van Klinken Bros., Inc.	Roza
Clifford R. VanBelle	Roza and Sunnyside
Dale Allen VanBelle	Roza
Debbie VanBelle	Roza
Esther VanBelle	Roza and Sunnyside
Susan Vennerly	Roza
Visser Farms, Inc.	Roza and Sunnyside Valley
Jennie V. Visser	Roza and Sunnyside Valley
William J. Visser	Roza and Sunnyside Valley
Margery Wagner	Roza
Walter A. Wagner	Roza
Mary L. Walker	Roza
Ray V. Walker	Roza
Hubert W. Watson	Kittitas
Mary Ellen Watson	Kittitas
Florence Ann Weaver	Kittitas
Paul J. Weaver	Kittitas
Joyce E. Weekes	Kittitas
Martin G. Weekes	Kittitas
Larry M. Wheeler	Roza
Phyllis Wheeler	Roza
Barbra Wickham	Roza
Max L. Wickham	Roza
Willard Farms, Ltd.	Roza
Leon Willard	Roza
Leon Willard	Sunhaven Farms
Richard Willard	Kittitas
Robert S. Williams	Roza
Robert T. Williams	Roza

Petitioners	Irrigation District
Vivian Williams	Roza
Woodworth Bros.,	Sunnyside Valley and Snipes Mountain
L. & S. Woodworth, Inc. dba Woodworth Bros.	Sunnyside Valley and Snipes Mountain
W.S. Farms, Inc.	Roza
Y & Y Farms, Inc.	Roza, Sunnyside Valley and North Outlook

Elbert B. Schinmann, et al., v. United States, United States Claims Court No. 226-80C.

Petitioners	Irrigation District
Elbert B. Schinmann	Roza and Sunnyside Valley
Teddie Marie Schinmann	Roza and Sunnyside Valley

R.E. Redman & Sons, Inc. v. United States, United States Claims Court No. 36-81C.

Petitioners	Irrigation District
R.E. Redman & Sons, Inc.	Wapato

Appendix E

United States Department of the Interior

(Letterhead)

Bureau of Reclamation
Pacific Northwest Region
Federal Building & U.S. Courthouse
Box 043-550 West Fort Street
Boise, Idaho 83724

In reply refer to: 700

Memorandum

To: Commissioner
From: Regional Director, Boise, Idaho
Subject: Yakima Project Water Supply Projections

Enclosed is our report on the review of the water supply projections for the Yakima Project. As a result of the review, we are implementing the following actions to improve our forecasting procedure for the Yakima Project:

1. Procedures for computing the total water supply available in the Yakima River basin and for distributing this supply to water rights recognized in the 1945 Consent Decree will be defined in operating instructions for the project. A process will be developed to resolve any differences in forecasts and computed water supplies which occur between Yakima Project Office and Regional Office hydrologists prior to publication of the data.

2. Review of forecasting procedures in the Yakima River basin with the National Weather Service, the Soil Conservation Service and the Washington State Department of Ecology.

3. The effort to develop a computer model for use in operating the Yakima Project, now underway as a study in the Yakima Valley Water Management Study, will be expedited.

4. Consideration will be given to providing to water users variable TWSA estimates which project both "conservative" and "normal" forecasts.

We have just reviewed the current water supply situation of the Yakima Project using the most recent runoff and water use data available. The current estimate of total water supply for the period of July through October is 1,260,000 acre-feet. This estimate assumes that (1) natural runoff will be equal to the smallest July, August, September, and October of record; (2) return flows will amount to about 50,000 acre-feet per month, flows realized in July through October, 1963, the minimum which occured for the period of 1960-75; (3) an estimated storage content on July 1 of 900,000 acre-feet, and (4) estimated spills past Parker of 20,000 acre-feet.

The current estimate represents an increase in supply from previous estimates. Some of the increase is attributed to additional natural flows over that previously forecasted and some to the fact that the diversions by the water users during the preceding months have been less than their decreed rights. It appears that the 1,260,000 acre-feet estimate will be adequate to fully meet average historical July through October diversions.

Converting our most recent forecast to compare with our mid-May estimate of April through October proratable water supply of about 50 percent results now in a 70 percent April through October proratable water supply.

ROD VISSIA

ENCLOSURE (2)

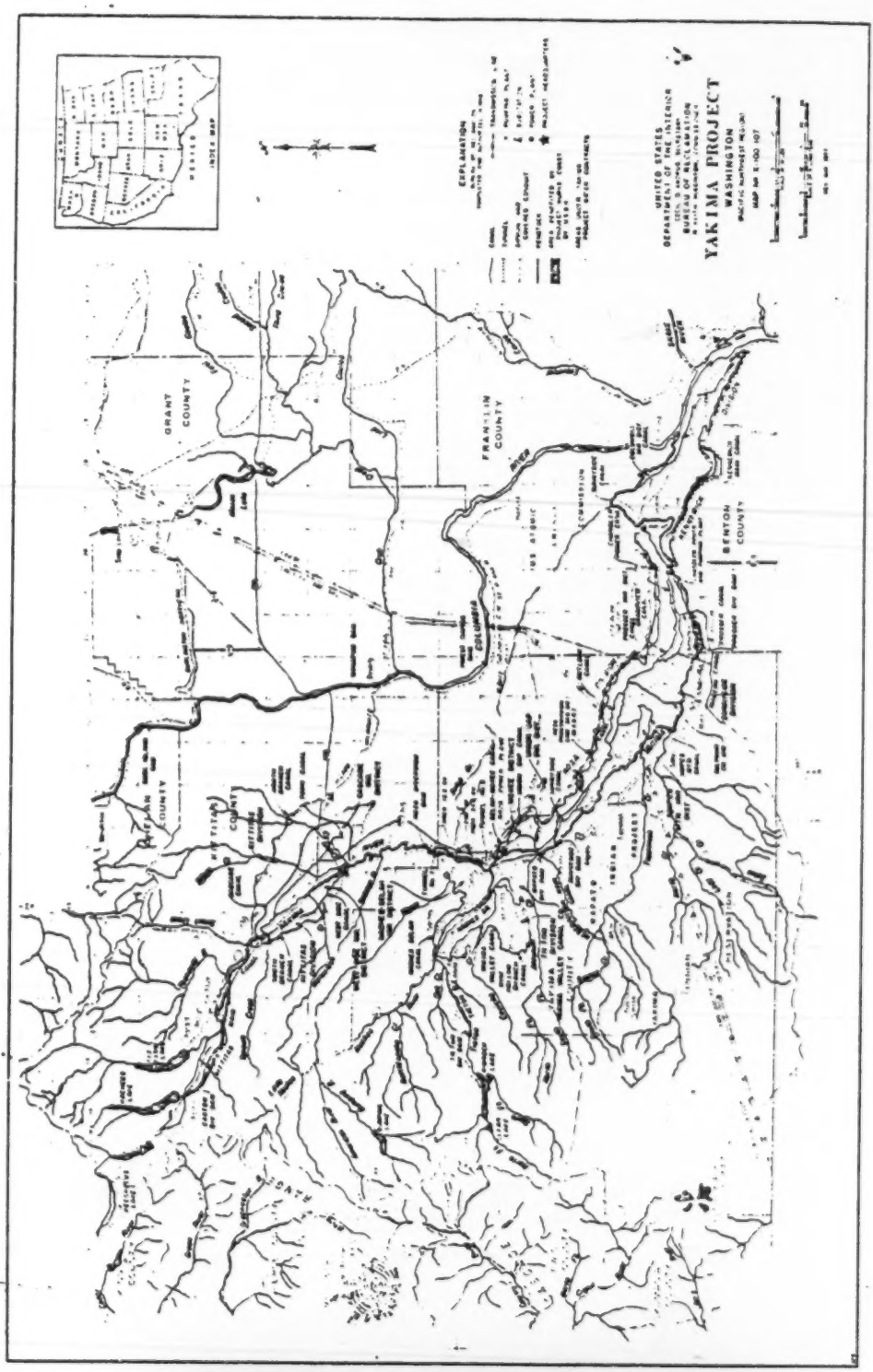
CC: PROJECT SUPERINTENDENT, YAKIMA WASHINGTON
W/ENCLOSURES (2)

A-45

Review of 1977
Water Supply Estimates
Yakima River Basin

YAKIMA PROJECT, WASHINGTON

U.S. Bureau of Reclamation
Pacific Northwest Region
June 1977



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INTRODUCTION

Extremely dry conditions occurred in the Yakima River basin from October 1976 through January 1977. The outlook was for the drought condition to continue during the remaining months preceding the 1977 irrigation season when precipitation normally occurs. Because of this, water users in the Yakima River basin, local and State agencies, and Federal agencies such as the Bureau of Reclamation became concerned about the availability of an adequate irrigation water supply to maintain agricultural production in the basin.

In February 1977, the Bureau of Reclamation provided an estimate of the total water supply available (TWSA). The February estimate of TWSA for the period April 1 through September 30, 1977, was 1,220,000 acre-feet. This volume is about 50 percent of the water required to satisfy all entitlements under the 1945 Consent Decree which is used to allocate supply among parties recognized in the decree. Allocation of the 1,220,000 acre-feet pursuant to the decree resulted in a projection that holders of proratable, or junior, water rights would witness severe shortages. The Kittitas Reclamation District and Roza Irrigation District, whose entire water supplies are proratable, would receive about 7 percent of their water entitlement.

The extreme deficiency in the Western United States water supply, including the Yakima River basin, resulted in the enactment of the Emergency Drought Act of April 7, 1977, an act to provide financial as well as technical assistance to relieve the impacts of the drought.

In April, Reclamation revised its TWSA estimate from 1,220,000 acre-feet to 1,390,000 acre-feet to reflect the favorable precipitation conditions that occurred in March. This resulted in a slightly improved water supply outlook for the basin and gave the proratable rights a 13 percent supply.

In May, there was evidence that irrigation diversions were being met with less demand on natural flow and storage than had been anticipated. This necessitated a review of the initial February TWSA estimate. As defined in the 1945 Consent Decree, the major components included in the computation of TWSA are:

(1) forecasted natural runoff, (2) available reservoir storage, and (3) other sources including diverted water which returns to streams for reuse—return flows. The review showed that the return flow component had not been adequately accounted for, and that this resulted in underestimating the available water supply by about 350,000 acre-feet. Addition of the 350,000 acre-feet to the April estimate resulted in a revised May TWSA of 1,740,000 acre-feet for a comparable April through September period. This change impacted primarily upon the Kittitas Reclamation District and the Roza Irrigation District because the decree's priority water rights had been satisfied and all newly projected water accrued to districts holding junior water rights. The result was an estimated water supply to these districts of about 50 percent of their entitlement, rather than the February estimate of 7 percent.

The purpose of this report is to discuss the procedure used in estimating the TWSA, to summarize a chronology of events from October to May, and to identify reasons for the change in the TWSA estimate.

SETTING

The Yakima River basin, located in south-central Washington, covers an area of about 6,000 square miles or about 4,000,000 acres. The basin centers around the city of Yakima and includes most of Yakima, Kittitas, and Benton Counties. Topography is characterized by a series of long, rather hilly ridges extending eastward from the Cascades and encircling flat valley areas. Elevations in the basin range from over 12,000 feet in the Cascades to about 350 feet at the confluence of the Yakima and Columbia Rivers.

The Yakima River and its tributaries drain the area. The Yakima River heads near the crest of the Cascade Range, above Keechelus Lake at elevation 2,517 and flows for 175 miles generally south-eastward to its confluence with the Columbia River near Richland. Major tributaries include the Kachess, Cle Elum, and Teanaway Rivers in the north and the Naches River, which has two major tributaries—Bumping and Tieton Rivers.

Ahtanum, Toppenish, and Satus Creeks join the river in the lower portion of the basin. Natural runoff for the basin above Parker averaged about 3.5 million acre-feet annually over the period 1940-1976. Natural runoff usually peaks in May and June and drops to its lowest point in August.

About 500,000 acres are now irrigated in the basin, of which approximately 460,000 acres receive service from federally constructed facilities. The major irrigation areas and their facilities are shown in table 1.

In 1975, the total gross crop value of crops produced on irrigated land on the Yakima Project was $233 million; an average of $586 per irrigated acre. Table 2 shows that of the 388,952 acres irrigated in 1975, perennial crops (hops, mint, asparagus, nursery stock, seeds, and fruits) accounted for 131,200 acres (34 percent). Perennial crops, if lost, can take from 2 to 8 years to reestablish, depending on whether they are special seed crops or fruits.

Table 1.—Yakima Project and Associated Areas

Division or Area	General Location	Irrigable Area (acres)	Major Irrigation Facilities	Source of Water(1)	Operating Organization
Kittitas	Kittitas Valley near Ellensburg	57,000	Easton Diversion Dam, Main Canal, North and South Branch Canals	Keechelus and Kachess Reservoirs	Kittitas Reclamation District
Tieton	Upper Yakima Valley	27,000	Tieton Diversion Dam Tieton Canal	Tieton Reservoir	Yakima-Tieton Irrigation District
Sunnyside	Lower Yakima Valley	104,000	Sunnyside Diversion Dam, Sunnyside Canal, pumping plants	All project reservoirs	Sunnyside Valley Irrigation District and others
Roza	Lower Valley north of Sunnyside Division	72,500	Roza Diversion Dam, Ridge Canal, and pumping plants	Keechelus, Cle Elum, Kachess Reservoirs	Roza Irrigation District
Kennewick	Extreme Lower Yakima Valley, Benton County	19,200	Prosser Diversion Dam, Chandler Canal, pumping plants, Kennewick Main Canal	(Some storage, but largely return flow)	Kennewick Irrigation District
Storage			Reservoirs: Keechelus, Kachess, Cle Elum, Tieton Bumping, Clear Creek	Regulates storage and distributes natural flow	Bureau of Reclamation
Wapato Project (Indian)	Lower Yakima Valley south of river	136,000(3)	Main and Pump Canals, and drainage works	All Yakima Project reservoirs	Bureau of Indian Affairs
Miscellaneous Areas(2)	Scattered	45,800	Numerous diversions, canals, and drainage works	Natural flow and storage water from reservoirs	Various irrigation districts, companies, and individuals

(1) Water supply for all areas comes from natural flow, storage, and return flow.

(2) Special and Warren Act Contractors.

(3) Acreage in the Ahtanum and Toppenish-Simcoe Units of the Wapato Project not dependent upon Yakima Project for water.

The water supply for the Yakima Project comes from natural flow, storage, and return flows. The six Federal reservoirs in the basin which help regulate this supply have a total storage capacity of 1,070,000 acre-feet—Bumping Lake (33,700 acre-feet), Keechelus Lake (157,800 acre-feet), Kachess Lake (239,000 acre-feet), Cle Elum Lake (436,900 acre-feet), Rimrock Lake (198,000 acre-feet), and Clear Lake (5,300 acre-feet). Other principal features include several diversion dams, two hydroelectric generating plants, canals, laterals, and pumping plants.

The Yakima Project is primarily an irrigation project with hydroelectric power generation an associated function. Project reservoirs do provide incidental flood control and recreation benefits, and project operation does provide some flows for fish.

Table 2.—Selected 1975 Crop Value Data, Yakima Project, Washington

Total Acreage	Crop	KENNEWICK ID Acres	KENNEWICK ID Crop Value	KITTITAS RD Acres	KITTITAS RD Crop Value	ROZA ID Acres	ROZA ID Crop Value
61,686	Grain	1,893	453	4,872	1,314	11,735	3,091
152,428	Forage	6,729	1,548	47,007	4,701	10,382	2,399
19,260	Field Crops	1,032	499	60	25	5,930	5,107
* 20,922	Hops	—	—	—	—	3,995	5,907
* 16,155	Mint	—	—	—	—	5,523	3,253
23,378	Vegetables	23	38	2,512	1,291	3,415	2,951
* 12,260	Asparagus	151	114	—	—	2,604	2,259
* 886	Nursery	29	52	—	—	458	824
* 1,718	Seeds	70	15	86	36	1,175	400
* 80,259	Fruit	1,884	2,741	44	8	20,167	30,588
389,952	Totals	11,811	5,460	54,581	7,375	65,384	56,779

* Denotes perennial crop figures

Table 2.—Selected 1975 Crop Value Data, Yakima Project, Washington (Continued)

Total Acreage	Crop	SUNNYSIDE DIV. Acres	SUNNYSIDE DIV. Crop Value	YAX-TIE ID Acres	YAX-TIE ID Crop Value	WAPATO IP Acres	WAPATO IP Crop Value	OTHERS Acres	OTHERS Crop Value
61,686	Grain	5,213	1,282	0	0	33,294	9,804	4,679	1,243
152,428	Forage	30,892	4,948	2,347	221	33,897	6,386	21,174	2,524
19,260	Field Crops	1,516	716	0	0	10,114	4,191	608	296
*20,922	Hops	5,697	8,258	25	32	7,686	10,520	3,519	5,326
*16,155	Mint	1,031	494	0	0	9,277	6,376	324	205
23,378	Vegetables	1,222	609	—	—	13,910	6,919	2,296	1,205
*12,260	Asparagus	5,330	3,838	—	—	3,371	3,002	804	678
*886	Nursery	70	68	—	—	309	556	20	37
*1,718	Seeds	110	49	—	—	190	35	87	19
*80,259	Fruit	11,163	11,786	17,277	22,163	11,029	16,640	18,695	27,113
389,952	Totals	62,244	32,048	19,649	22,416	123,077	64,429	52,205	188,507

* Denotes perennial crop figures.

YAKIMA PROJECT OPERATION

The six project reservoirs are the key to the regulation and utilization of the Yakima basin water supply. Operation of these reservoirs provides the control necessary to meet the basin's irrigation needs by the storage of winter and spring runoffs for subsequent use during the months of July, August, and September when natural runoff is low and irrigation demands are high. The carryover of water supplies in storage from one irrigation season to the next is an essential ingredient in assuring a continued supply in water deficient years.

Yakima Project operation depends upon the magnitude of the TWSA.

Irrigation districts begin to prime and test their systems as early as March 20. The irrigation of crops normally commences April 1, and terminates about October 15.

At the close of the irrigation season, reservoir releases are stopped to provide opportunity for structural inspection and maintenance.

Winter storage releases are dependent on the amount of carryover storage and fall precipitation. Rain-on-snow floods can occur during this period. Following a flood, reservoirs are lowered to levels that, based on studies of past record, will provide space for future flood flows and yet assure that reservoirs can be filled for irrigation if precipitation ceases to occur.

Fishery flows are provided in normal water supply years below Prosser Diversion Dam. During the period July 11 through August 31 and December 1 through February 28, this flow is 50 cubic feet per second,. The flow is increased to 200 cubic feet per second during the period March 1 though July 10 and September 1 through November 30. Also, in September, flows are made available at Easton Dam for fish propagation.

Key data points for water control in the basin are gaging stations on the Yakima River near Umtanum and Parker and on the Naches River near Naches. Inflow to reservoirs and discharge at these points is monitored to assure that proper operation for irrigation, flood control, and other functions is being achieved.

1945 CONSENT DECREE

Rights to divert waters of the Yakima system for irrigation were allocated by the United States District Court at Yakima January 31, 1945, in Civil Action No. 21, commonly referred to as the 1945 Consent Decree.

Parties to the decree are:

1. Sunnyside Division including:
   - Sunnyside Valley Irrigation District
   - Prosser Irrigation District
   - Snipes Mountain Irrigation District
   - Grandview Irrigation District
   - Zillah Irrigation District
   - Granger Irrigation District
   - Outlook Irrigation District
   - Sunnyside Irrigation District
2. Tieton Division
3. Kittitas Division
4. Roza Division
5. Selah & Moxee Irrigation District
6. West Side Irrigating Company
7. Union Gap Irrigation District
8. Broadway Irrigation District
9. Cascade Irrigation District
10. Terrace Heights Irrigation District
11. Moxee Ditch Company—Sub A
12. Naches-Selah Irrigation District
13. Yakima Valley Canal Company

The Wapato Indian Project is not a party nor signatory to the decree, but its rights are recognized and defined. The parties to the decree and the Wapato Indian Project represent 85-90 percent of the water used in the basin. There are about 40 other districts or water using entities which are not party to the decree but belong to a group defined in Article 19 of the decree as "users of natural flow rights from the Yakima River and its tributaries, which have heretofore been recognized by the United States whether or not such users are parties to this action . . ."

The decree sets out the rights and responsibilities of the United States acting through the Bureau of Reclamation which are (1) the United States can divert flood waters, (2) the United States is responsible for making certain prescribed amounts of water available at the points of diversion (head gates) of irrigation districts, and (3) the United States is responsible for determining amount and assuring availability of water necessary for fish passage over Sunnyside Dam during periods of flood water diversions in item 1.

The decree states that waters of the basin shall be meted out from the "total water supply available" (TWSA) which is defined as "that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs of the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States." The rights of the parties are classified as nonproratable and proratable. Nonproratable rights are held by those water users with the earliest developed lands, and these rights are to be served first from the total water supply in the basin. the nonproratable rights and related water quantities are identified in Article 19 of the decree as follows:

1. 720 cfs for the Wapato Indian Project which was provided for by the Act of August 1, 1914 (38 Stat. 604).

2. 250 cfs for the Tieton Division for the months of May, June, July, August, and September.

3. 700 cfs April 1 through October 20 for lands within the Sunnyside Valley Irrigation District.

4. 35 cfs of water for Kennewock (sic) lands served from the Sunnyside Canal.

5. 26 cfs for use on Peity Flat lands served from the Sunnyside Canal.

6. 25 cfs in accordance with a contract dated September 24, 1910, between the United States and the Prosser Falls Land & Power Company, said water delivered from Sunnyside Canal.

7. 5 cfs for the Town of Prosser, also served from the Sunnyside Canal.

8. 150 cfs for the Cascade Irrigation District from March 15 to July 20, and 16,800 acre-feet of water from July 20 to October 15 provided by a contract of December 12, 1906, and 30 cfs of stock water from October 15 to March 15.

9. Amounts claimed by other water users or natural flow rights from Yakima River and its tributaries which have heretofore been recognized by the United States whether or not such users are parties to this action, and the summation of said amounts shall also be deducted from the total water supply available subject to proration.

With the nonproratable water uses identified and quantified, the decree implies that all other waters available are proratable and that all proratable waters are of equal priority.

The basis in proratable water right totals about 1,284,000 acre-feet. About 83 percent of the proratable water is held by the Roza Irrigation District, the Kittitas Reclamation District, and the Wapato Indian Project. A distribution of the proratable water is:

Area		Proratable Right acre-feet
Kittitas Reclamation District ..	336,000	(100 percent of supply)
Roza Irrigation District	375,000	(100 percent of supply)
Wapato Indian Project	350,000	(53 percent of supply)
Sunnyside Division	142,684	(31 percent of supply)
Yakima-Tieton Irrigation District	38,181	(33 percent of supply)
Other small holdings	42,295	(5-10 percent of supply)
Total	1,284,160	

Because all of the rights held by the Kittitas and Roza districts are proratable, these two districts are especially affected in years of short water supply.

The Kittitas Reclamation District and the Roza Irrigation District recently submitted a motion to the U.S. District Court to reopen and interpret the 1945 Consent Decree. The Court, on April 26, 1977, rendered its opinion that while it had no authority to reopen the decree, it did by the terms of the decree, have jurisdiction to interpret and administer it. The Court ordered and agreed that (1) the motion of the defendants to reopen the 1945 Consent Decree was denied, (2) the interpretation of the decree by the Bureau of Reclamation as to priority and scheduling of water delivery is reasonable and correct, and (3) the order was without prejudice to the rights of the parties to seek further interpretation or administration of the provisions of the decree. Subsequently, the Yakima Project Superintendent was appointed to act as watermaster under the decree.

The hydroelectric plants in the system do not have storage water rights; the plants operate on flows subordinate to irrigation rights.

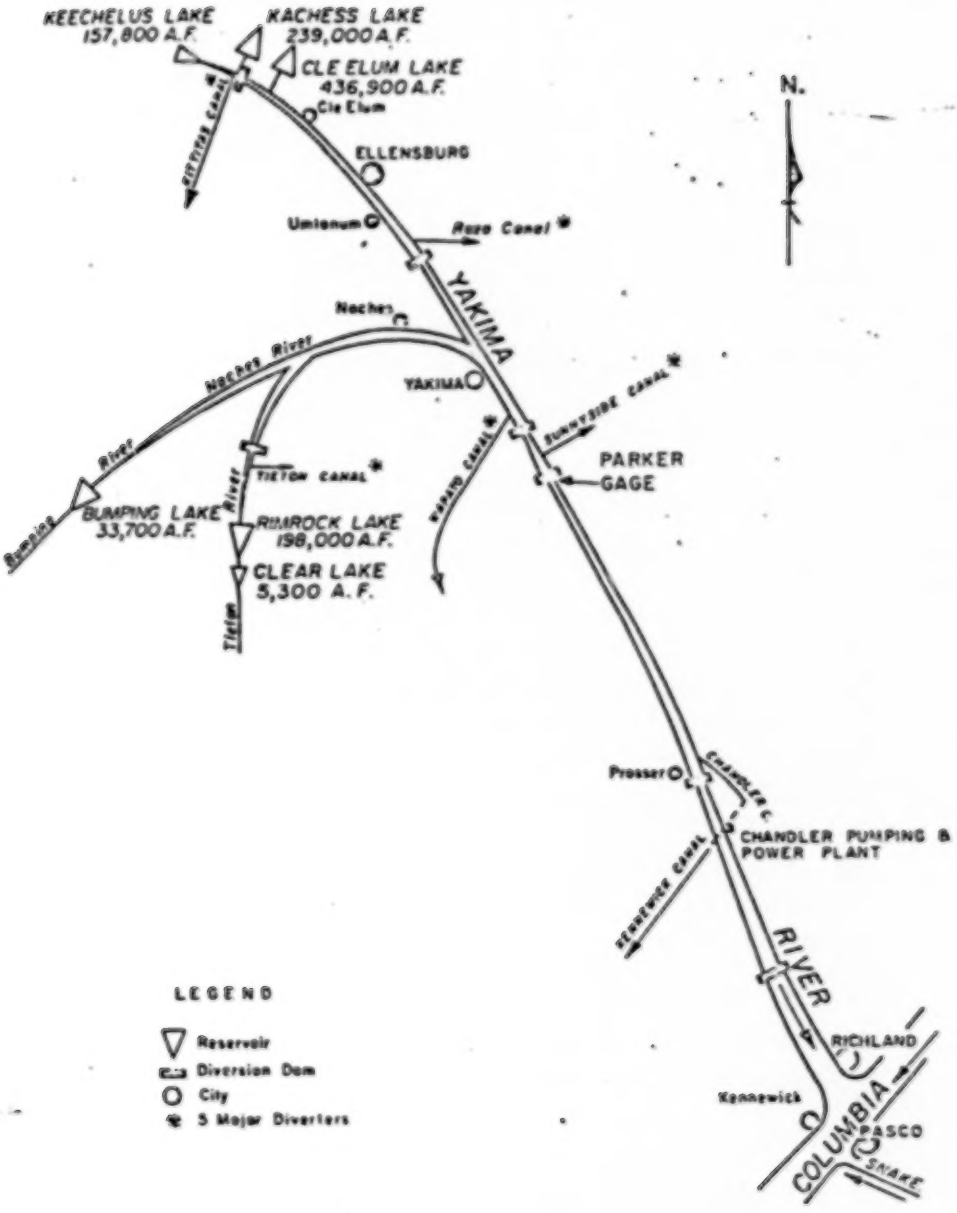
COMPUTATION OF TOTAL WATER SUPPLY AVAILABLE

The Consent Decree provides a means of distributing water among the parties thereto in years of deficient supplies. Since the effective date of the decree, the water users in the Yakima River basin have enjoyed, in most instances, years of adequate supplies.

This, combined with the fact that actual diversions have historically totaled less than entitlements, has made a strict allocation of the water supply under the decree unnecessary.

This section of the report consists of two parts: Part I describes the correct procedure that should be used for computing the TWSA if the provisions of the Consent Decree are to be applied for distributing deficient water supplies, and Part II describes the procedure which was followed in computing TWSA for 1977.

The Yakima River basin schematic illustrates principal drainage, project storage, and points of diversion to major diverters.



SCHEMATIC
YAKIMA RIVER BASIN

PART I

The computation of TWSA for the Yakima River basin consists of three major ingredients—(1) a forecasted runoff of the natural flows which would be realized at the Parker gage[1], (2) the water accumulated in storage, and (3) water that has been diverted for use and returns to the streams for reuse (return flows). It is necessary that the components be calculated to cover compatible time frames; e.g., February through July.

The forecasted runoff of natural flows is computed as follows:

1. The historical snowpack, precipitation, and antecedent runoff[2] data are correlated with historical natural flow data observed at the Parker gage over a 37 year period of record. (1940-1976) to provide, for the current period of October through July, a volume forecast of natural runoff which will pass the Parker gage.

2. In order that the forecast of natural runoff at the Parker gage might approximate predevelopment conditions, several adjustments, based upon historical data over the 37-year period, are made in its computation. An adjustment is made to account for natural runoff, which entered the system but was retained in storage (plus) or flows in the river that were attributed to releases of stored runoff (minus); an adjustment is made to recognize the historical diversions of the five major water users (Kittitas Reclamation District, Roza Irrigation District, Sunnyside Division, Wapato Indian Project, and the Yakima-Tieton Irrigation District) and the numerous small canals upstream of the Parker gage which would have otherwise, prior to irrigation development, been observed at the gage (plus); and an adjustment is made to

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[1] Parker is the point of regulation on the Yakima River for flood control and the lowest point on the river which requires storage or natural flow water to meet irrigation diversions during summer operations. Diversions below Parker are satisfied by return flows; therefore, any water passing the Parker gage is essentially lost to the system.

[2] Antecedent runoff is the late summer runoff of the previous year which serves as an indicator for the current year base flow.

account for flows from irrigation diversions which have historically returned to the stream (minus).

Once the forecast of natural runoff is computed, the quantity of water available in storage is added as a second component of TWSA.

The third component in the TWSA computation is the volume of return flows that can, on the basis of the water supply anticipated to be available for diversions during the current irrigation season, be expected to enter the Yakima River system above Parker. Return flow can be defined as that portion of diverted water that will return to the stream and be available to downstream users.

The forecast of natural runoff, water available in storage, and return flows are combined to yield the total water supply available. A simplified example would be:

Natural runoff forecast	100 acre-feet
Reservoir storage available	100 acre-feet
Return flow estimate	100 acre-feet
Total water supply available (TWSA)	300 acre-feet

Part II

In the past, the primary purpose of the forecast of natural runoff, the first ingredient in computing TWSA, has been to formulate reservoir operations directed at (1) filling reservoirs for irrigation and (2) providing adequate reserve of storage space for flood control without jeopardizing irrigation supplies. Due to normal or above normal water conditions usually with considerable carryover in storage, the emphasis has been on the routing of the forecasted runoff of natural flows to prevent flooding rather than on the computation of TWSA and its distribution under the Consent Decree. Therefore, the procedure discribed (sic) in Part 1 has, in the past, been modified in the following respects.

1. In computing the forecasted runoff of the natural flows, the diversions of the small canals upstream of the Parker gage and the return flows have not been specifically identified. Historically, these diversions and return flows have been approximately equal in volume and have had an offsetting

affect in the computation of the forecasted natural flow. The adjustments which have been included, however, have been sufficient to result in forecasted natural flow reasonably close to predevelopment conditions for the purpose for which the forecast has been used, the routing of natural runoff.

2. The concept has been that the third component of the TWSA, return flows, was accounted for in the computation of the forecasted natural flow runoff since they were considered an offsetting factor to the small canal diversions. Therefore, in the past, this component has not been included as a specific addition to the TWSA estimate.

In order that the water users would be aware of the anticipated supplies that they would have available for use in 1977, the TWSA was computed and distributed under the Consent Decree. The February, March and April computation of TWSA followed the procedure outlined in Part II. The fact that the return flows are not included in the TWSA estimate using this procedure results in an underestimate of the water supply when making a distribution under the Consent Decree. Consequently, an erroneously lower water supply was projected for proratable water right holders since these rights are only satisfied after the nonproratable rights are fully met. In May, TWSA was computed by the procedure outlined in Part I, which includes return flow as a specific addition, and the supply available for distribution to the proratable water rights increased by about 350,000 acre-feet from the April estimate.

1977 TOTAL WATER SUPPLY AVAILABLE ESTIMATE AND REVISIONS

This section presents a monthly chronology of conditions and events related to the 1977 TWSA estimate through May 1977. Tables 3 and 4 summarize monthly precipitation and runoff data for the period October 1976 through May 1977 and contrast precipitation and runoff actually experienced during this period with normal levels. Table 5 presents runoff forecasts made at the beginning of each nonth by the Bureau of Reclamation, Soil Conservation Service, and National Weather Service.

This section also discusses Reclamation's February TWSA estimate, subsequent revisions to that forecast in April and May, and factors related to those revisions. Table 6 summarizes these estimates.

October 1976

Major canal diversions for the 1976 irrigation season had terminated by October 20.

Precipitation levels in October were extremely low. Records show that precipitation ranged from 28 percent of normal at the Rimrock measuring station to a high of 50 percent at the Keechelus station. Total precipitation measured at the five major reservoirs averaged only 38 percent of normal.

Keechelus Dam was closed for gate replacement, and all inflow was being stored. The gates at Bumping Lake were open and inoperable because of damage resulting from a fire at the gatehouse on Labor Day. However, Bumping Lake closure was not a concern at this time since the dam usually is not closed until later in the water year. Cle Elum Dam was closed for inspection of cylinder gates. Kachess and Tieton Dams were operating at a controlled release of 40 cubic feet per second.

November 1976

November precipitation levels remained extremely low. Rimrock station recorded precipitation at 16 percent of normal. Precipitation measured at Keechelus station was 48 percent of normal. Precipitation at all reservoirs averaged 36 percent of normal. October through March precipitation levels in the Yakima basin bear heavily on calculation of the water supply forecasts, and one-third of this time period had passed with critically low recordings.

Table 3.—Precipitation Data, Yakima Project, Washington (inches)

Reservoir(1)	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May
Bumping Lake								
1976-1977	1.35	1.79	2.05	1.26	2.35	3.42	1.31	2.71
Normal(2)	4.09	7.53	9.07	8.75	6.04	4.50	2.56	1.75
Percent normal	33	24	23	14	39	76	51	155
Cle Elum Lake								
1976-1977	1.20	2.03	3.00	2.76	3.16	2.71	.62	.83
Normal(2)	3.38	5.76	6.84	6.87	4.48	3.02	1.75	1.21
Percent normal	36	35	44	40	71	90	35	69
Kachess Lake								
1976-1977	1.63	3.58	4.24	3.73	4.10	4.86	.97	1.87
Normal(2)	4.84	7.73	9.54	9.72	6.67	4.85	3.07	1.85
Percent normal	34	46	44	38	61	100	32	101
Keechelus Lake								
1976-1977	3.22	4.75	6.04	4.14	5.86	7.90	1.96	2.60
Normal(2)	6.39	9.99	11.57	11.02	8.04	6.20	4.05	2.57
Percent normal	50	48	52	38	73	127	48	101
Rimrock Lake								
1976-77	.61	.65	1.34	.22	1.50	2.07	.24	1.17
Normal(2)	2.16	4.10	4.86	4.63	2.97	2.05	1.25	.93
Percent normal	28	16	28	5	51	101	19	126
Total								
1976-1977	8.01	12.80	16.67	12.11	16.97	20.96	5.10	9.18
Normal(2)	20.86	35.11	41.88	40.99	28.20	20.62	12.68	8.31
Percent normal	38	36	40	30	60	102	40	110

(1) Clear Lake, just above Tieton Dam, is not included in this tabulation. With an active storage capacity of 5,300 acre-feet in the total system storage capacity of 1,070,700 acre-feet, it plays a very small role in operations. Because of its limited storage capacity and minimal fluctuations during the operating season, Clear Lake is included only as a part of the Yakima Project system active storage capacity.

(2) 1940-1975 period except Kachess, which is 1944-1975.

Table 4.—Runoff Data, Yakima Project, Washington (1,000 acre-feet)

Reservoir(1)	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May
Bumping Lake								
1976-1977	3.6	4.3	4.1	5.4	5.4	4.5	13.2	20.9
Normal(2)	6.9	13.2	14.5	13.2	13.1	11.1	16.6	44.6
Percent normal	52	33	28	41	41	41	80	47
Cle Elum Lake								
1976-1977	11.8	21.2	22.5	40.1	27.1	23.4	65.6	63.7
Normal(2)	27.7	44.6	42.0	41.0	38.9	37.4	64.4	152.9
Percent normal	43	48	54	98	70	63	102	42
Kachess Lake								
1976-1977	1.8	8.2	12.2	15.6	11.7	11.0	21.4	19.0
Normal(2)	9.5	18.6	18.6	19.4	17.8	16.0	25.2	45.0
Percent normal	19	44	66	80	66	69	85	42
Keechelus Lake								
1976-1977	5.1	13.2	15.4	21.3	14.2	11.2	27.5	22.1
Normal(2)	13.9	24.1	21.7	21.5	19.5	15.8	26.9	49.0
Percent normal	37	55	71	99	73	71	102	45
Rimrock Lake								
1976-77	16.3	12.1	10.5	11.5	9.9	10.3	19.1	24.1
Normal(2)	16.2	22.5	23.9	24.5	26.1	29.3	33.2	64.7
Percent normal	101	54	44	47	38	35	58	37
Total								
1976-1977	38.6	59.0	64.7	93.9	68.3	60.4	146.8	149.8
Normal(2)	74.2	123.0	120.7	119.6	115.4	109.6	166.3	356.2
Percent normal	52	48	54	79	59	55	88	42

(1) Clear Lake, just above Tieton Dam, is not included in this tabulation. With an active storage capacity of 5,300 acre-feet in the total system storage capacity of 1,070,700 acre-feet, it plays a very small role in operations. Because of its limited storage capacity and minimal fluctuations during the operating season, Clear Lake is included only as a part of the Yakima Project system active storage capacity.

(2) 1958-1972 average.

Table 5.—Runoff Forecast, Yakima River at Parker, Yakima Project, Washington (1,000 acre-feet)

Forecast Date	Forecast Period	Bureau of Reclamation(1) Volume	Bureau of Reclamation(1) % of Normal 1958-72	Soil Conservation Service(2) Volume	Soil Conservation Service(2) % of Normal 1958-72	National Weather Service(3) Minimum Probable	NWS % of Normal 1958-72	NWS Most Probable	NWS % of Normal 1958-72	NWS Maximum Probable	NWS % of Normal 1958-72
January	January-July	1,781	64								
	April-July			No January							
	April-September			Forecast Made		610	35	987	57	1,370	79
February	February-July	1,077	42								
	April-July			610	36						
	April-September			640	36	332	19	549	32	879	51
March	March-July	700	31								
	April-July			365	21						
	April-September			380	22	198	11	372	22	687	40
April	April-July	682	35								
	April-July	682	35	460	27						
	April-September			480	28	287	17	533	31	885	51
May	May-July	349	23								
	April-July			290	22						
	April-September					248	14	427	25	745	43
		(4)		(5)				(6)			

(1) USBR forecast period=date through July.
(2) SCS forecast periods=April through July and April through September.
(3) NWS forecast period=April through September.
(4) Average January-July=2,792,000 acre-feet
Average February-July=2,541,000 acre-feet
Average March-July=2,256,000 acre-feet
Average April-July=1,960,000 acre-feet
Average May-July=1,550,000 acre-feet
(5) Average April-July=1,701,000 acre-feet
(6) Average April-Sept.=1,730,000 acre-feet

Bumping Lake Dam remained open in accordance with usual winter operating procedure. Keechelus and Cle Elum Dams remained closed for construction and maintenance. Releases of about 40 cubic feet per second continued at Kachess and Tieton Dams.

December 1976

The Rimrock station recorded precipitation was 28 percent of normal, and the Keechelus station had 52 percent. Of even greater concern was the fact that accumulated precipitation levels since October were only about 35 percent of normal. December is usually a high yield month for precipitation in the basin. However, snow courses observed at White Pass and Bumping, Cle Elum, and Keechelus Lakes were bare. Bumping Lake Dam remained open. Keechelus, Kachess, Cle Elum, and Tieton dams were closed.

January 1977

Drought conditions in January caused great alarm. The Rimrock station recorded precipitation levels were 5 percent of normal. Precipitation recorded at Keechelus was 38 percent. Precipitation during the month at the five reservoirs averaged about 30 percent of normal. The snow water content at the end of the month for the six snow courses used in Reclamation forecasts was only 10.6 percent of the 1940-1971 average. The October through January precipitation accumulation was about 35 percent of normal. These values were lower than any year since complete recording began in 1940.

February 1977

The initial estimate of TWSA for 1977 was made in February. As discussed previously, the forecast of natural runoff is a major component in computing TWSA. Early in February, application of the customary Reclamation methodology resulted in a natural runoff forecast of 1,077,000 for the period February through July. This forecast recognized the low precipitation levels that had occurred since October but assumed that normal precipitation

levels would occur over the balance of the forecast period. This is the usual procedure followed in the forecast.

Weather conditions were deviating drastically from normal levels. Drought conditions were unprecedented in basin records. Because of this, there was concern about adopting the initial 1,077,000 acre-foot runoff forecast which assumed that normal precipitation levels would be realized during the forthcoming months.

Runoff forecasts of the National Weather Service and Soil Conservation Service indicated an extremely low runoff condition (table 5). The National Weather Service's February forecast covered a range of three runoff conditions—minimum probable, most probable, and maximum probable runoff for the period April through September. The minimum probable forecast was 332,000 acre-feet, or 19 percent of normal; the most probable was 549,000 acre-feet, or 32 percent of normal; and the maximum probable was 879,000 acre-feet, or 51 percent of normal. The Soil Conservation Service's February forecast was 640,000 acre-feet, or 36 percent of normal.

A direct comparison of these forecasts could not be made. For example, Reclamation's 1,077,000 acre-foot forecast covered the period February through July, while the National Weather Service and Soil Conservation Service forecasts covered the period April through September. Therefore, the Bureau's 1,077,000 acre-foot estimate was adjusted to April by taking out anticipated February and March runoff contributions. This resulted in a residual estimate of 847,000 acre-feet for the April through July period. This estimate still exceeded the National Weather Service's most probable estimate of 549,000 acre-feet and the Soil Conservation Service's forecast of 640,000 acre-feet. The effect of extending the Reclamation forecast to September to be consistent with the National Weather Service and Soil Conservation Service was not computed. This adjustment would have had the effect of increasing the Reclamation forecast which was already high in comparison.

Water users witnessing the unprecedented drought conditions were anxious to know what supply could be expected so that they

could make adjustments in their operations. In recognition of (1) extremely low precipitation levels since October, (2) the likelihood that the drought conditions would continue into the foreseeable future, and (3) the fear of promising more water than could be delivered, Reclamation adopted a conservative or "bottom-line" runoff forecast of 360,000 acre-feet.

The forecast of natural runoff for the period April through September (360,000 acre-feet) was added to an estimated April 1 storage available (860,000 acre-feet) to produce a TWSA estimate of 1,220,000 acre-feet. Since water users were anxious to know the effect of the low TWSA estimate on their operations, Reclamation made a tentative distribution of the water supply (1,220,000 acre-feet) in accordance with the 1945 Consent Decree allocation. Reclamation had not in earlier years related TWSA to the decree because the water supply had been sufficient since 1945 to preclude disasterous water supply conditions even though some irrigators had experienced significant shortages.

The 1,220,000 acre-feet was allocated among all rights recognized in the Consent Decree. It was assumed that the nonproratable users would use 100 percent of their entitlement. The effect of this allocation was felt most severely by holders of proratable rights since they are the junior rights in the valley. Because the water supply for the Kittitas Reclamation District and the Roza Irrigation District is entirely proratable, the projected water supply for these districts was critically low. The February TWSA estimate indicated that the water supply available to the two districts would be 7 percent of decree entitlements. Subsequently, irrigators began to initiate actions to obtain supplemental water supplies and adjust cropping programs.

Precipitation for the month of February remained below normal. Precipitation levels at the reservoirs averaged 60 percent of normal. Precipitation accumlation for the October through February period was 40 percent of normal. All reservoirs were storing inflow. Bumping Lake gates were closed, and the reservoir subsequently filled May 12. May through June is the usual filling period for Bumping Lake.

March 1977

Weather conditions during February did little to improve runoff, and the March 1 estimate of TWSA remained unchanged (1,220,000 acre-feet).

Improved precipitation levels and snowpack during March were encouraging. Precipitation at the five major reservoirs totaled 102 percent of normal.

April 1977

With the improved precipitation conditions in March, the estimated TWSA of 1,220,000 acre-feet was increased to 1,390,000 acre-feet (table 6). The forecast of natural runoff was increased from 360,000 acre-feet to 500,000 acre-feet, and the storage content was adjusted from 860,000 acre-feet, to 890,000 acre-feet.

The new TWSA estimate was allocated to all water rights recognized in the 1945 Consent Decree. This increased the supply to the Roza and Kittitas districts from 7 to 13 percent of their decree entitlements.

Late in the month, there began to be evidence that irrigation diversions were being met with less depletion of the TWSA than had been anticipated. This improved water supply condition was attributed to water conservation by irrigators.

May 1977

Operational data continued to show that diversions were being met with less demand on storage and natural flow than had been anticipated. A significant part of the demand was being satisfied by return flows. It was apparent at this time that the water supply available and the demand were seriously out of balance.

A review of the February, March, and April TWSA estimates and a comparison of the procedure used in their computation (described in Part II of the previous section) with the correct computation procedure (described in Part I) showed that return flows had not been properly accounted for if the provisions of the

Consent Decree are to be applied. As previously mentioned, the historical diversions of the small canals and return flows to the system have been approximately equal and thus in the forecast computation were not specifically identified since they had a cancelling effect. However, since the intent of the forecast is to provide an estimate of the natural runoff which is anticipated to occur in the year being analyzed, and since the TWSA as defined in the decree includes natural flows, stored water, and waters from other sources, it is necessary to add to the forecasted natural flows and stored waters the waters which, after diversion and application by the users, return to the waterways for subsequent reuse by others. This was not done under the procedure followed in computing TWSA in February, March, and April. This was the error and resulted in an artificially high projection of shortages to holders of proratable water rights.

It was estimated that the return flow contribution to TWSA for 1977 would be approximately 350,000 acre-feet. It is not possible to precisely forecast return flow volumes. Dry soil conditions, reduced irrigation diversions, and onfarm conservation, as anticipated at the beginning of the 1977 irrigation season, would tend to reduce return flows. However, warm temperatures in April produced a favorable runoff pattern which could offset the above effects.

Even though the snowpack was critically low, April weather produced a runoff pattern that made it possible to utilize or divert over 90 percent of the snowmelt water. With this runoff condition, near-normal irrigation diversions were possible throughout the valley. These full diversions combined with above-normal precipitation levels in March and May improved soil moisture and ground water conditions. A review of annual estimates from 1960-1975 shows that return flow volumes were about 400,000 acre-feet for 12 of the 16 years. Volumes of 450,000 to 500,000 acre-feet occurred during 2 years of the 16-year period, and in 2 years the volume was estimated at slightly less than 350,000 acre-feet.

Adding the estimated return flow volume of 350,000 acre-feet to the natural runoff forecast (500,000 acre-feet) and storage content (890,000 acre-feet) produced a May TWSA estimate of 1,740,000 acre-feet for the April through September period.

Allocation of the revised TWSA estimate (1,740,000 acre-feet) to all rights recognized in the 1945 Consent Decree resulted in a major improvement in water supply outlook. Since nonproratable rights are satisfied first from TWSA, all of the increase in TWSA accrued to proratable water right holders. Two large districts (Kittitas Reclamation District and Roza Irrigation District) hold 55 percent of the proratable rights; and since that is the only type of water right held by these two districts, their entire water supply is affected. Because all of the increase in TWSA was allocated to proratable water right holders, the supply to the Kittitas and Roza districts increased dramatically from 13 percent to 50 percent. This 385 percent increase for these two districts compares to a 25 percent increase in the total project water supply as a result of the revision.

Table 6.—Total Water Supply Estimate and Revisions (million acre-feet)

	Feb.	March	April	May
USBR initial forecast natural runoff ..	1.077(1)			
TWSA estimate				
Adopted forecast of natural runoff(2)	.360	.360	.500	.500
Storage contents(3)	.860	.860	.890	.890
Return flow	—	—	—	.350
TWSA estimate	1.220	1.220	1.390	1.740

(1) 1.077 represents February through July forecast. This figure adjusted to an April through July forecast would be .847.

(2) Forecast for April through September.

(3) April 1 storage (estimated prior to April 1, actual thereafter).

CLE ELUM LAKE STORAGE

The anticipated shortages in the supply of water for the Kittitas Reclamation District and the Roza Irrigation District prompted the districts and the Bureau of Reclamation to seek alternative sources of water. One possibility which both districts were interested in was the evacuation of water from the dead storage pool of Cle Elum Lake. The active reservoir capacity of the lake is 436,900 acre-feet; approximately 100,000 acre-feet of water could be obtained by installing facilities to pump from the dead storage pool. The proposed plan, accepted by the districts through resolutions of the directors indicating their willingness to enter into repayment contracts, involved the installation and operation of facilities on barges to pump from the dead storage pool. The estimated cost of $3 million was to be financed by a grant-loan from the State of Washington and funds provided under the Federal Emergency Drought Act. Kittitas was scheduled to repay 47 percent of the cost and Roza 53 percent.

As a result of the May TWSA estimate, the pumping of 100,000 acre-feet of water from the dead pool would provide Kittitas with a water supply of 64 percent of its decree rights and Roza 64 percent in lieu of the 50 percent both districts are now

estimated to receive. However, the Kittitas directors have indicated their desire not to participate in the pumping plan. The Roza directors and possibly the Wapato Indian Project are interested in securing the Kittitas Reclamation District share. Discussions are ongoing with these two entities.

Water from the dead storage pool will be used this year as needed and next year if drought conditions persist. There is also a potential use during the replacement of the outlet works cylinder gates which is scheduled for 1978. When the gate replacement is initiated, the only way to evacuate water from the reservoir will be by means of the spillway which will preclude the evacuation of about 150,000 acre-feet of active capacity in addition to the dead storage pool. The use of the pumping installation could permit the withdrawal of the 150,000 acre-feet.

CONCLUSIONS

1. Prior to February, 1977, unprecedented drought conditions existed in the Yakima Basin. The Bureau of Reclamation made a 1977 water supply forecast. This was compared with the forecasts made by the Soil Conservation Service and the National Weather Service. These forecasts were lower than the Bureau's and because of the unprecedented drought conditions, the Bureau reduced its forecast by projecting a continuation of drought conditions throughout 1977.

2. Distribution of the total water supply available to all water right diversions recognized in the 1945 Consent Decree had not been necessary previously because of more favorable water supply conditions. This is the first time that a detailed TWSA computation and distribution had been necessary to project water supply available to parties recognized in the decree.

3. Bureau of Reclamation computation of the TWSA in the February through April estimates did not adequately account for return flows. This resulted in a significant underestimate of TWSA. This short supply, when related to the allocation specified in the 1945 Consent Decree, had the result of producing a forecast of severe water shortages for holders of proratable, or junior, water rights recognized in the decree.

4. The May estimate of TWSA resulted in a 25 percent increase in the total project water supply. However, this additional supply all accrued to those holding proratable or junior water rights since senior water right holders had already been satisfied. The two districts most affected are the Kittitas Reclamation District and the Roza Irrigation District since all of their water supply is from proratable water rights. Therefore, the revised estimate resulted in a 385 percent increase in projected supply for these two districts.

5. The May TWSA estimate resulted in a major improvement in the supply outlook for proratable water right holders. The May TWSA estimate of 1,740,000 acre-feet represented about 70 percent of the total project water supply requirements.

Appendix F

January 31, 1945

In the District Court of the United States for the
Eastern District of Washington, Southern Division
Civil Action No. 21
Kittitas Reclamation District:
Selah & Moxee Irrigation District: and
United States of America
Plaintiffs,
vs.
Sunnyside Valley Irrigation District:
Christina Marina Eder:
Luis Luccolini and Ruffemia Luccolini, his wife:
Mazine A. Fox and Josie R. Fox, his wife:
Elmer A. Bacon and Artie Bacon, his wife:
Philip Louis Parks and Ollie D. Parks, his wife:
Roza Irrigation District:
Yakima Reservation Irrigation District:
Yakima-Tieton Irrigation District:
Tieton Water Users' Association:
Grandview Irrigation District:
Granger Irrigation District:
Prosser Irrigation District:
Snipes Mountain Irrigation District:
Sunnyside Irrigation District:
Zillah Irrigation District:
Broadway Irrigation Company:
Moxee Ditch Company Sub-A:
Naches-Selah Irrigation District:
Terrace Heights Irrigation District:
Union Gap Irrigation District:
West Side Irrigating Company:
Yakima Valley Canal Company:
Outlook Irrigation District: and
Cascade Irrigation District.
Defendants

JUDGMENT

The above-entitled cause having come on for hearing and it appearing to the Court that the plaintiffs and the defendants have concluded and settled all issues in this cause: that the parties hereto have joined in a Motion for Entry of Judgment: that the provisions hereafter set forth in this judgment constitute the agreement of the parties with respect to such issues; and that upon consideration of the record herein and the Motion for Entry of Judgment the Court finds that the Motion for Entry of Judgment should be granted:

NOW, THEREFORE, it is ordered, adjudged and decreed as follows:

1. The defendants, Christina Mariea Eder, Luis Luccolini and Ruffenia Luccolini, his wife, Mazine Z. Fox and Josie R. Fox, his wife, Elmer A. Bacon and Artie Bacon, his wife, Philip Louis Parks and Ollie D. Parks, his wife, and the Yakima Reservation Irrigation District are dismissed as defendants in this cause.

2. The obligations of the United States to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants, and to the lands within the Wapato Indian Irrigation Project, are as set forth hereafter in this judgment.

3. SUNNYSIDE DIVISION.—The United States shall divert each year into the Sunnyside Main Canal, hereafter referred to as the Sunnyside Canal, to supply the water rights of the parties entitled to receive water from the Sunnyside Canal in the Sunnyside Division, a total quantity of 449,520 acre-feet of water on the following monthly schedule:

	Average Rate of Diversion in Cubic Feet per Second	Diversion in Acre-feet
April	895	53,230
May	1,209	74,340
June	1,280	76,150
July	1,290	79,300
August	1,290	79,300
September	995	59,190
October	456	28,010
		449,520

The foregoing schedule of diversions shall be increased commensurate with the quantities of water to be acquired from the United States by the Grandview, Outlook, Granger, Prosser and Zillah Irrigation Districts, as set forth in paragraph 6 of this judgment: Provided, however, that the water acquired by those Districts shall not be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

(a) SUNNYSIDE VALLEY IRRIGATION DISTRICT.—The United States shall divert annually into the Sunnyside Canal a total quantity of 340,944 acre-feet of water to supply the water rights of said District and the water users within the District, including water users who have no water right applications or contracts with the United States, on the following schedule:

	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
April	658	39,159
May	901	55,409
June	960	57,089
July	973	59,798
August	983	60,439
September	753	44,780
October	612	24,270
		340,944

(b) PROSSER IRRIGATION DISTRICT.—The United States shall divert into the Sunnyside Canal 7,347 acre-feet of

water annually, which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, and the United States or its successor in the operation of the said Canal shall deliver pursuant to the contract dated December 1, 1917, with the Prosser Irrigation District, at Mile 55.05 and Mile 59.32 of the Sunnyside Canal in an amount not exceeding the following schedule:

Month	Acre-feet per acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery during any one month shall not exceed the following schedule:

April	14	second-	feet
May	16	"	"
June	21	"	"
July	21	"	"
August	21	"	"
September	14	"	"

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The United States or its successors in the operation of the said Canal, in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, shall deliver to the Prosser Irrigation District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its

contract with the United States, dated August 4, 1916, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The foregoing quantities of water for the Prosser Irrigation District shall be increased 2,500 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(c) SNIPES MOUNTAIN IRRIGATION DISTRICT.—The United States shall divert into the Sunnyside Canal 9,247 acre-feet of water annually, which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for by contracts between the United States and the Snipes Mountain Irrigation District dated November 16, 1914, and July 11, 1931. There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal a total of 5,265 acre-feet, pursuant to the contract dated November 16, 1914, between the United States and the Snipes Mountain Irrigation District, at the following points on the Snipes Mountain Canal: (a) at Mile 9.05, (b) at Mile 10.20, and (c) near Mile 6.42. The annual irrigation season shall be from April to September, inclusive; the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the following schedule, shall be 17.7 cubic feet per second and the monthly supply of water shall not exceed the following monthly schedule of deliveries:

Month	Acre-feet Total of Contract
April	685
May	840
June	1050
July	1055
August	950
September	685
Total	5265

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

In addition to the water supply provided for in said contract of November 16, 1914, the United States or its successors in the operation of the Sunnyside Canal pursuant to a contract dated July 11, 1931, with the District, shall deliver annually a total of 2674 acre-feet at the following points; (a) Mile 9.05 of the Snipes Mountain Canal; (b) at Mile 1.15 of the West Branch of the Snipes Mountain Canal; and (c) near Mile 6.42 of the Snipes Mountain Canal. The annual irrigation season shall be from April 1 to September 30, inclusive, and the mean monthly supply of water to be furnished under said contract shall not be in excess of the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	287.40
May	16	459.84
June	19	546.06
July	21	603.54
August	20	574.80
September	14	402.36
Totals	100	2,874.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(d) GRANDVIEW IRRIGATION DISTRICT.—The United States shall divert into the Sunnyside Canal 14,586 acre-feet of water annually which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for in contracts between the United States and Grandview Irrigation District dated October 4, 1916, and February 21, 1933. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to the said contracts at Mile 50.35 of the Sunnyside Canal and at Mile 2.87 of the Rocky Ford branch canal of the said Sunnyside Canal in an amount not exceeding the following monthly schedule:

Month	Acre-feet per acre
April	.36
May	.45
June	.52
July	.53
August	.53
September	.36
Total	2.75

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the above schedule, shall be 34 c.f.s.

There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, to the Prosser Irrigation

District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its contract with the United States, dated August 4, 1916, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The United States or its successor in the operation of the Sunnyside Canal shall also deliver each year, in addition to the water supply provided for in the foregoing contract of August 4, 1916, pursuant to its contract of February 21, 1933, with the District, 1970 acre-feet of water at Mile 50.35 of the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be furnished under said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	9	184
May	26	501
June	8	151
July	9	186
August	9	186
September	18	362
October	21	400
Totals	100	1,970

The foregoing quantities of water for the Grandview Irrigation District shall be increased 3,000 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(e) ZILLAH IRRIGATION DISTRICT.—The United States shall divert into the Sunnyside Canal 362 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated September 29, 1922, as amended by the contract of June 22, 1931, between the United States and the Zillah Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to the said contracts at turnouts numbered 15.47 and 15.62 and 16.82 on the Sunnyside Canal and the mean monthly supply of water shall not exceed the following schedule of percentages of the total diversion:

Month	Per Cent
April	9
May	15
June	19
July	19
August	19
September	13
October	6
Total	100

The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year.

The foregoing quantities of water for the Zillah Irrigation District shall be increased 200 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(f) GRANGER IRRIGATION DISTRICT.—The United States shall divert into the Sunnyside Canal 5,454 acre-feet of water annually which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated November 20, 1922, between the United States and the Granger Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract during the irrigation season from April 1 to September 30, inclusive, at the head of the pressure pipe at Mile 23 of the Sunnyside Canal, said water to be delivered to the District in amounts not to exceed the following schedule:

Month	Acre-feet per acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The maximum rate of flow which the District may demand during any one month shall be as follows:

Month	Rate of flow
April	10.9 c.f.s.
May	12.6 "
June	15.2 "
July	15.2 "
August	15.2 "
September	10.9 "

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing quantity of water for the Granger Irrigation District shall be increased 1,800 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the

District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(g) OUTLOOK IRRIGATION DISTRICT.—The United States shall divert into the Sunnyside Canal 17,855 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amount of water provided for in the contract between the United States and Outlook Irrigation District dated November 23, 1914, as amended by the contracts of August 1, 1916, and July 1, 1919, and the contract dated December 20, 1932. The United States or its successor in the operation of the Sunnyside Canal pursuant to the said contract of November 23, 1914, as amended, shall deliver 14,530 acre-feet at Mile 30.25 on the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the maximum rate of flow which the District may demand during any one month, based on the following schedule, shall not exceed 46 c.f.s. and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	1,890
May	2,380
June	2,730
July	2,820
August	2,820
September	1,890
Total	14,530

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the

officer in charge of the administration of the water supply for the Yakima project.

The United States or its successor in the operation of the Sunnyside Canal, pursuant to the contract dated December 20, 1932, with the District, in addition to the water supply provided for in said contract of November 23, 1914, as amended, shall deliver annually 1,185 acre-feet at the headworks of the District in the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be delivered under the terms of said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	6	70
May	11	130
June	16	185
July	15	180
August	15	180
September	12	145
October	25	295
Totals	100	1,185

The foregoing quantities of water for the Outlook Irrigation District shall be increased 4,500 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(h) SUNNYSIDE IRRIGATION DISTRICT.—The United States shall divert into the Sunnyside Canal 21,044 acre-feet of water, which quantity of water includes estimated losses between the point of diversion and the point of delivery, to supply

the amounts of water provided for in a contract dated October 6, 1914, between the United States and the Sunnyside Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract to the headworks of the District, which are located on the West line of Section thirteen (13), Township nine (9) North, Range twenty-five (25) East, W.M., eleven hundred fifty-four and five-tenths (1154.5) feet North of the Southwest corner of said section, and the point at which said Canal enters said District. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	2,410
May	2,960
June	3,700
July	3,690
August	3,350
September	2,410
Total	18,520

The maximum rate of flow which the District may demand during any one month, based on the above schedule, shall not exceed 60 c.f.s. Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(i) Nothing in this decree shall preclude the Prosser Irrigation District, Snipes Mountain Irrigation District, Grandview Irrigation District, Zillah Irrigation District, Granger Irrigation District, Outlook Irrigation District or Sunnyside Irrigation District from the permissive use of surplus water in the Sunnyside Canal if available in the month of October, to the same extent and under the same conditions as prior to the entry of this judgment.

4. WAPATO INDIAN IRRIGATION PROJECT.—The United States shall deliver, pursuant to the Act of August 1, 1914, 38 Stat. 582, in perpetuity for lands within the Yakima Indian Reservation, hereinafter referred to as the Wapato Indian Irrigation Project, at the northern boundary thereof, a total of 720 cubic feet of water per second.

The United States shall, pursuant to the agreement dated September 21, 1943, between the Bureau of Reclamation and the Office of Indian Affairs, which superceded the agreement of March 9, 1921, as amended by an agreement dated September 3, 1936, divert from the Yakima River 250,000 acre-feet of water each year for the lands of the Wapato Indian Irrigation Project, such water to be measured at the diversion works of the Wapato Indian Irrigation Project. The irrigation season for the delivery of the 20,000 acre-feet of water shall be from April 1 to September 30, each year, except as the season may be by the United States extended to include the month of October. The diversion of the said 250,000 acre-feet of water shall be in accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing basic schedule, as provided in the agreement of September 21, 1943, may be revised for a particular irrigation season or part of a season by agreement to be entered into prior to or during the irrigation season affected, between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs, to permit an interchange of quantities of water available at such time as storage is being released for use below Union Gap during the months of June, July, August and September and to permit the use of part of such available quantities during the month of October. The revision in

such schedule shall be effective only as to the months of June, July, August and September in the same irrigation season as the making of the agreement and only from the date of storage release.

The United States shall divert each year in addition to the water supply hereinabove set forth for the Wapato Indian Irrigation Project, in accordance with the agreement dated September 3, 1936, between the Office of Indian Affairs and the Bureau of Reclamation, and the Act of July 1, 1940, 54 Stat. 707, 100,000 acre-feet of water from the Yakima River, to be measured at the diversion works of the Wapato Indian Irrigation Project. The annual irrigation season for the delivery of such water shall be from April 1 to September 30 each year and the diversion of said 100,000 acre-feet shall be in accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing schedule, as provided in the agreement of September 3, 1936, may be revised by agreement between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs to permit, subsequent to the date of storage release, for use below Union Gap in the months of June, July, August and September, the use of water interchangeably during said months in an amount not to exceed 70,000 acre feet.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said agreements.

5. TIETON DIVISION *(Tieton Water Users' Association and Yakima-Tieton Irrigation District)*. The United States shall divert annually into the Tieton Main Canal, to supply the water rights of parties entitled to receive water from the said Canal, for use on the Lands within the boundaries of the Yakima-Tieton Irrigation District, 96,000 acre-feet on the following monthly schedule:

Month	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
May	293	18,000
June	336	20,000
July	325	20,000
August	325	20,000
September	302	18,000
		96,000

The foregoing schedule of diversions shall be increased commensurate with the quality of water to be acquired from the United States by the Yakima-Tieton Irrigation District as provided in paragraph 6 of this judgment: Provided, however, that the water acquired by that District shall not be diverted into the Tieton Main Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

6. KITTITAS DIVISION *(Kittitas Reclamation District)*. The United States shall deliver to the Kittitas Reclamation District, pursuant to a contract dated February 16, 1921, as amended by the contracts of November 1, 1930, and June 4, 1940, and *January 10, 1945*, between the United States and the Kittitas Reclamation District, at a point opposite the headworks of the District constructed on the Yakima River in Section eleven (11), Township twenty (20) North, Range thirteen (13) East, W.M., during each irrigation season, 342,000 acre-feet of water measured at or near said diversion works for use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 20 to October 15, inclusive, and the mean monthly supply of water shall not exceed the following schedule of percentages of the total annual diversion as hereinafter set forth:

During April	2%
During May	17%
During June	21%
During July	21%
During August	20%
During September	13%
During October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

The Kittitas Reclamation District has released, pursuant to the foregoing contract, as amended, to the United States 20,000 acre-feet of water in the months of April, May and June, and 10,000 acre-feet of water during the months of July, August, September and October from its water supply provided for in said contract, as amended, such water to be sold by the United States to the following irrigation districts in the amounts set opposite the respective districts:

Yakima-Tieton Irrigation District	18,000 acre-feet
Granger Irrigation District	1,800 acre-feet
Outlook Irrigation District	4,500 acre-feet
Grandview Irrigation District	3,000 acre-feet
Prosser Irrigation District	2,500 acre-feet
Zillah Irrigation District	200 acre-feet

7. ROZA DIVISION *(Roza Irrigation District)*.—The United States shall deliver to the District, pursuant to a contract dated July 8, 1921, between the United States and the Yakima-Benton Irrigation District (now Roza Irrigation District), as amended by the contract of April 15, 1935, at a point opposite the headworks of the District located in Section twenty-eight (28), Township fifteen (15) North, Range nineteen (19) East, W.M. 375,000 acre-feet of water measured at or near said diversion works for use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive; and the mean monthly supply of water shall not exceed the following schedule of percentages of the total annual diversion as hereinafter set forth.

During April	10%
During May	15%
During June	19%
During July	19%
During August	19%
During September	12%
During October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

8. SELAH & MOXEE IRRIGATION DISTRICT.—The predecessor in interest of the Selah & Moxee Irrigation District, in accordance with the instrument known as a limiting agreement, executed January 25, 1906, recorded March 12, 1906, in Volume 41 of Deeds at page 416 of the records of Yakima County, Washington, limited its rights in the natural flow of the Yakima River as follows:

April to August, inclusive	September	October
78 c.f.s.	60 c.f.s.	40 c.f.s.

Such rights have been recognized by the United States in a contract dated November 15, 1920, between the District and the United States.

The United States shall deliver to the District, in accordance with the foregoing contract, 3,000 acre-feet of water at a point opposite the headworks of the District on the Yakima River which headworks are located in Section seventeen (17), Township fourteen (14) North, Range nineteen (19) East, Willamette Meridian, the water to be delivered as nearly as practicable in compliance with the orders of the District.

The United States shall deliver annually to the District, pursuant to its contract dated April 30, 1931, with the District, in addition to the water supply provided for in said contract of November 15, 1920, 1757 acre-feet of water at the head of the Selah-Moxee ditch. The annual irrigation season for the delivery of water under said contract dated April 30, 1931, shall be from

April 1 to September 30, inclusive, each year and the mean monthly supply of water to be delivered under said contract of April 30, 1931, shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	175.70
May	16	281.12
June	19	333.83
July	21	368.97
August	20	351.40
September	14	245.98
	100	1,757.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts. The foregoing obligation of the United States to deliver water also is subject to an agreement dated October 27, 1939, between the Selah & Moxee Irrigation District and Terrace Heights Irrigation District, under the terms of which the Selah & Moxee Irrigation District transferred for the use of lands in the Terrace Heights Irrigation District one-tenth of the foregoing amounts. By reason thereof, the obligation of the United States to deliver the foregoing amounts is reduced by one-tenth.

9. WEST SIDE IRRIGATING COMPANY.—The West Side Irrigating Company, in accordance with the instrument which it executed October 21, 1905, known as a limiting agreement, which instrument was recorded on the 14th day of March, 1906 in Book 2 of Water Rights at page 315 of the records of Kittitas County, Washington, limited its water rights in the natural flow of the Yakima River to 80 c.f.s. during the months of April to September, inclusive, and 34 c.f.s. during the month of October of each year. These rights were recognized by the United States in its contract of August 1, 1922, with said Company.

The United States, in accordance with the said contract of August 1, 1922, in addition, shall deliver to the Company 25 c.f.s. from April 20 to September 30, inclusive, provided that the total quantity of such water be limited to 8,200 acre-feet. The water

shall be measured at a point in the canal known as the millpond wasteway and flume, located in the Southeast Quarter of the Southeast Quarter (SE¼ SE¼) of Section Three (3), Township Eighteen (18) North, Range Seventeen (17) East of the Willamette Meridian.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

10. UNION GAP IRRIGATION DISTRICT.—The Union Gap Irrigation Company and the Fowler Ditch Company, predecessor in interest of the Union Gap Irrigation District, to which reference is hereafter made, in accordance with the instrument which they executed on November 25, 1905, known as a limiting agreement, limited their water rights in the natural flow of the Yakima River as follows:

April to August, inclusive	23 c.f.s.
September	16 c.f.s.
October	12 c.f.s.

These rights were recognized by the United States in its contract of May 23, 1906, with the Union Gap Irrigation Company.

The United States shall deliver, pursuant to the said contract of May 23, 1906, during the months from April to August, both inclusive, 28 c.f.s., during the month of September, 19 c.f.s., and during the month of October, 14 c.f.s. During the months from November to March both inclusive the United States in accordance with the contract shall deliver a reasonable amount of water for stock purposes. All water covered by the contract of May 23, 1906, shall be diverted and measured at the intake of the Fowler ditch.

In addition, the United States shall deliver to the Union Gap Irrigation District, successor in interest of the Fowler Ditch Company, pursuant to its contract with the District dated March 2, 1915, 4222 acre-feet of water at the headworks of the District located approximately 950 feet west and 650 feet north of the southeast corner of Section seven (7), Township thirteen (13) North Range nineteen (19) East, W.M. The annual irrigation

season for the delivery of water under the contract shall be from April 1 to October 31, inclusive, and the monthly supply of water furnished under said contract of March 2, 1915, shall not exceed the following schedule of deliveries:

During April	534 acre-feet
During May	675 acre-feet
During June	712 acre-feet
During July	737 acre-feet
During August	797 acre-feet
During September	534 acre-feet
During October	233 acre-feet
	4,222

The maximum flow for any one month to be 13 c.f.s.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

11. BROADWAY IRRIGATION COMPANY.—The United States shall deliver to the Broadway Irrigation Company 700 acre-feet from the natural flow water available in Wide Hollow Creek pursuant to its contract with the Company dated December 1, 1921, and shall deliver said water at a point opposite the Company's headworks located 600 feet west of the east quarter corner of Section thirty-five (35), Township thirteen (13) North, Range eighteen (18) East of the W.M. The annual irrigation season shall be from April 1 to October 31, inclusive, and the monthly supply of water shall not exceed the following schedule of percentage of the total annual diversion as hereinafter set forth:

During April	10%	- 70	acre-feet
During May	15	- 105	acre-feet
During June	19	- 133	acre-feet
During July	19	- 133	acre-feet
During August	19	- 133	acre-feet
During September	12	- 84	acre-feet
During October	6	- 42	acre-feet
Total		700	

The quantity of water to be delivered shall be limited to that which is available in Wide Hollow Creek.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

12. CASCADE IRRIGATION DISTRICT.—The Cascade Canal company, in accordance with an instrument known as a limiting agreement which it executed December 12, 1906, limited its rights in the natural flow of the Yakima River to 150 c.f.s. from the period from March 15, to July 20: from July 20 to October 15 such rights are limited in accordance with the storage contract referred to in the succeeding paragraph, and from October 15 to March 15 to 30 c.f.s. for stock purposes. Such rights have been recognized by the United States in a contract dated December 12, 1906, between the District and the United States. All of the rights of the Cascade Canal Company were transferred to and are now owned by the Cascade Irrigation District.

The United States shall deliver to the Irrigation District pursuant to the contract of December 12, 1906, a total of 16,800 acre-feet of water between July 20 and October 15 of each year, delivery of water to be at points higher on the river than the headgate of said District located in the Northwest Quarter (NW¼) of Section twenty-eight (28), Township nineteen (19) North, Range seventeen (17) East, W.M., and the water to be measured at a point on said canal below and within 100 feet of a certain wasteway from said canal in Section thirty-four (34), Township nineteen (19) North, Range seventeen (17) East, W.M. At no time under said contract shall the District require a flow in excess of 150 c.f.s. of time.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

13. TERRACE HEIGHTS IRRIGATION DISTRICT.—The United States shall, in accordance with its contract of February 10, 1940, with the Terrace Heights Irrigation District, which supplemented the contract of March 24, 1931, deliver annually a maximum of 3,259.5 acre-feet of water per annum, measured at or near the points of diversion in the main Roza Canal, the maximum not (sic) deliveries at the points of

delivery, after the deduction of 10% for evaporation and seepage losses, to be made in accordance with the following monthly schedule:

Month	Total Acre-feet	Second Feet
April	416.1	6.99
May	483.8	7.87
June	501.5	8.43
July	531.2	8.64
August	521.6	8.48
September	357.7	6.01
October	121.7	1.98
Total	2,933.6	

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contract.

14. MOXEE DITCH COMPANY, SUB-A.—The Moxee Company, in accordance with an instrument known as a limiting agreement which it executed October 24, 1905, limited its rights to divert water from the Yakima River as follows:

April to August inclusive	September	October
38 c.f.s.	29 c.f.s.	22 c.f.s.

The rights so limited were later divided between the Moxee Ditch Company and the Hubbard Ditch Company as follows:

Moxee Ditch Company

April to August, inclusive	11 c.f.s.
September	8.4 c.f.s.
October	6.4 c.f.s.

Hubbard Ditch Company

April to August, inclusive	27 c.f.s.
September	20.6 c.f.s.
October	15.6 c.f.s.

Such rights have been recognized by the United States in its contract with the Moxee Ditch Company, Sub-A, dated June 27, 1929.

The United States shall deliver annually to the Moxee Ditch Company, Sub-A, 959.4 acre-feet of water at the head of the Moxee or Hubbard Ditch in accordance with said contract of June 27, 1929. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year and the mean monthly supply of water furnished under the contract shall not exceed the following schedule of percentages of the total annual diversion:

April	9%
May	15
June	19
July	19
August	19
September	13
October	6

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

15. NACHEE-SELAH IRRIGATION DISTRICT.—The predecessor in interest of the Nachee-Selah Irrigation District, in accordance with the instrument executed December 21, 1905, known as a limiting agreement, limited its rights in the Yakima River during the months of April to September, inclusive, to 105 c.f.s., and 100 c.f.s. during the month of October, said limiting agreement having been recorded March 12, 1906, in Vol. 41 of Deeds, page 420, Records of Yakima County, Washington. Subsequent to execution of the limiting agreement, the predecessor in interest of the District acquired through conveyances certain additional water, and the United States by a contract dated April 6, 1920, with the Naches-Selah Irrigation District recognized in the District the following rights or such part thereof as may be available in the natural flow of the Yakima River:

	April to August	September	October
Limiting agreement water	105 c.f.s.	105 c.f.s.	100 c.f.s.
Additional water	11.77 c.f.s.	8.51 c.f.s.	6.91 c.f.s.
Totals	116.77 c.f.s.	113.51 c.f.s.	106.91 c.f.s.

In addition to the above mentioned water the Naches-Selah Irrigation District subsequent to the execution of said agreements purchased and acquired an additional water right of 2 c.f.s., which has been diverted through the canal of said District and used upon lands therein.

The United States shall deliver annually to the District in accordance with its contract of April 6, 1920, from April 1 to August 31, inclusive, a supply of "supplemental water" to be delivered in amounts not to exceed the following schedule of deliveries:

During April	674 acre-feet
During May	811 acre-feet
During June	901 acre-feet
During July	1050 acre-feet
During August	1050 acre-feet
Total	4486 acre-feet

The maximum rate of flow for such supplemental water shall not exceed 17.1 c.f.s. and shall be delivered at a point opposite the headworks of the District on the Naches River in the Southwest Quarter (SW¼), Northwest Quarter (NW¼), section thirty-five (35), Township fifteen (15) North, Range sixteen (16) East, W.M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

16. YAKIMA VALLEY CANAL COMPANY.—The Yakima Valley Canal Company, in accordance with the instrument which it executed January 8, 1906, known as a limiting agreement, which was recorded March 12, 1906, in Vol. 41 of Deeds at page 397, Yakima County, Washington, limited its water rights to 62½ c.f.s. during the months of April to August, inclusive, 40 c.f.s. during the month of September, and 30 c.f.s. during the month of October of each year. Subsequent to the limiting agreement the Company acquired certain additional water rights, purported to be 1½ c.f.s. by a conveyance recorded in Vol. 146 of Deeds, page 566 of the Yakima County records.

The United States by its contract with the Yakima Valley Canal Company, dated June 2, 1920, recognized in the Company the following rights or such part thereof as may be available from the natural flow of the Yakima River:

	April to August (both inclusive)	September	October
Limiting agreement water	62.5 c.f.s.	40 c.f.s.	30 c.f.s.
Transferred Water	1.5 c.f.s.	1.5 c.f.s.	0.75 c.f.s.
	64 c.f.s.	41.5 c.f.s.	30.75 c.f.s.

The United States shall deliver to the Company each year, in accordance with the contract of June 2, 1920, 4300 acre-feet of storage water. Delivery of such water shall be made at a point opposite the headworks of the Company on the Naches River in the Northwest Quarter (NW¼) of Section twenty-five (25), Township fourteen (14) North, Range seventeen (17) East, W.M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contracts.

17. The United States shall continue to divert available flood water from the Yakima River and its tributaries in accordance with its practice prior to the entry of this judgment, and the quantities of such water which the parties to this judgment are entitled to receive shall be over and above the schedules of diversion hereinabove set forth. Within the meaning of this judgment, flood water is available for such diversions when, as determined by the Yakima Project superintendent, there is flowing over the Sunnyside dam flood water in excess of the amount he deems necessary for proper river regulation, including in said amount the amount necessary to protect fish life in the river below said dam. The determinations by the Yakima Project Superintendent as to whether flood water is available for such diversions shall be binding upon the parties hereto, subject to review by the court. The United States, or its successor in the operation of the Sunnyside Canal, shall deliver at the points of delivery in said Canal, as above set forth, the pro rata shares of the Sunnyside

Valley, Prosser, Snipes Mountain, Grandview, Zillah, Granger, Outlook and Sunnyside Irrigation Districts of said flood waters.

18. The parties to this judgment, except as provided in paragraph 19 hereof, shall have equal rights with respect to the priority in the delivery of the quantities of water to which they are entitled under the preceding paragraphs of this judgment. If for any cause it is impossible to supply fully these quantities, the water subject to proration to which each party to this judgment is entitled shall be proportionately diminished. The pro rata share of that water which each of the parties to this judgment shall receive during a period of insufficient supply shall be an amount in the same proportion to the quantity of water subject to proration that each of the parties is entitled to under this judgment as the total water supply available, as hereinafter defined, less the summation of the rights recognized in paragraph 19 bears to the aggregate of the following quantities of water: Those quantities of water provided for in this judgment which are subject to proration, and those quantities subject to proration which the United States has contracted to deliver to water users not parties to this judgment; provided, however, that during the period of development of the Rosa (sic) Division the amount of water to be included for that Division in the foregoing aggregate shall be the amount diverted for the irrigated lands of that Division in a normal year, plus estimated losses from the point of diversion to the place of delivery, rather than the amount recognized in paragraph 7 of this judgment; and provided further that, during the period of development of the Roza Division, in computing the pro rata share of water which the Roza Division will be entitled to receive in a period of insufficient supply there will be used that quantity of water diverted for the Roza Division in a normal year plus estimated losses, rather than the quantity recognized for that Division in paragraph 7 of this judgment.

For the purpose of this judgment "total water supply available" is defined as that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the

use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

19. The following amounts of water are excepted from the preceding paragraph with respect to proration, and the summation of said amounts shall be deducted from the "total water supply available" subject to proration:

(1) 720 c.f.s. of water for the use on lands within the Wapato Indian Irrigation Project provided for by the Act of August 1, 1914 (38 Stat. 604), which amount shall constitute the limit of the water rights of the said Project not subject to proration.

(2) 250 c.f.s. of water during the months of May, June, July, August, and September of the amount heretofore recognized in this judgment for the use on lands within the Tieton Division, which amount shall constitute the limit of the water rights of said Division not subject to proration.

(3) 700 c.f.s. of water during the months of April, May, June, July, August, September, and the first 20 days of October, of the amount heretofore recognized in this judgment for the use on lands within the Sunnyside Valley Irrigation District, which amount shall constitute the limit of the water rights of said District not subject to proration, except as to those lands within the Sunnyside Valley Irrigation District which are covered by sub-paragraph 6 hereof. Provided, however, that not exceeding 50 c.f.s. of said amount may be measured daily by the Bureau of Reclamation from return flow of the Roza Division into the Sunnyside Canal. The amounts so excepted from proration shall be for the benefit of all lands within the Sunnyside Valley Irrigation District, subject to classification of lands by the Board of Directors of the District.

(4) 35 c.f.s. of water for the use on the so-called Kennewick lands, served from the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(5) 26 c.f.s. of water, for the use on Piety Flat lands, in accordance with the contract of May 1, 1914, between the United States and Piety Flat Ditch Company, served from the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(6) 25 c.f.s. of water, in accordance with the contract of September 24, 1910, between the United States and Prosser Falls Land and Power Company, served from Sunnyside Canal, which is the limit of this right not subject to proration.

(7) 5 c.f.s. of water, in accordance with the contract between the United States and the Town of Prosser, dated May 3, 1911, served from the Sunnyside Canal, which is the limit of this right not subject to proration.

In addition to the amounts herein set forth which shall be excepted from paragraph 18 with respect to proration, there also shall be excepted from paragraph 18 the rights of Cascade Irrigation District which are recognized in paragraph 12, and the amounts claimed by other water users of natural flow rights from the Yakima River and its tributaries, which have heretofore been recognized by the United States whether or not such users are parties to this action, and the summation of said amounts shall also be deducted from the total water supply available subject to proration. Exception from proration of such amounts specified in the preceding sentence from the total water supply available does not constitute a determination of the quantum or priority of such claimed rights, and is without prejudice to any of the parties to this action.

20. This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources to the parties to this judgment and the lands within the Wapato Indian Irrigation Project. Each of the parties to this cause, their grantees, successors and assigns are by this judgment forever enjoined and restrained from asserting any claim to or from interfering with any of the rights to the use or the delivery of those quantities of water which are recognized in this judgment. This judgment shall not,

however, be construed as limiting or in any way interfering with the transfer or legal succession of any of those rights. The rights of any claimants to water of the Yakima River or watershed who are not parties to this cause shall in no way be prejudiced or affected by this judgment nor will it in any way prejudice or affect the rights of the parties to this judgment as they may pertain to the rights of such claimants. This judgment shall be binding upon and inure to the benefit of the grantees, assigns or successors of the parties hereto. The several parties to this suit shall pay their own costs in this action.

The court, in its discretion, may appoint a watermaster, who shall be vested with such authority as the Court deems appropriate in the administration of the water rights, subject to the provisions of this judgment. This Court shall retain jurisdiction over matters of interpretation of this judgment and matters relating to the administration thereof.

Done in open court this 31 day of January, 1945.

L. B. SCHWELLENBACH

Judge

In the District Court of the United States
For the Eastern District of Washington
Southern Division

Civil No. 21

Kittitas Reclamation District, et al.,
Plaintiffs,
v.
Sunnyside Valley Irrigation District, et al.,
Defendants.

CONSENT TO JOINDER OF NEW DEFENDANT

We, the undersigned duly qualified officers of the Cascade Irrigation District, do hereby signify our consent to joinder of the Cascade Irrigation District as a co-defendant in the above entitled action, and to entry of Judgment thereon against all the defendants, and including the Cascade Irrigation District, as agreed by our counsel Short and Short, Attorneys at law.

Leslie Wilson
Director

Guy F. Murchland
Director

Earl E. Anderson
Director

Approved by:

SHORT & SHORT by B. P. Short
Attorneys for Cascade Irrigation District

In the District Court of the United States
For the Eastern District of Washington
Southern Division

Civil No. 21

Kittitas Reclamation District, et al.,
Plaintiffs,

v.

Sunnyside Valley Irrigation District, et al.
Defendants.

MOTION FOR ORDER FOR JOINDER OF NEW DEFENDANT

Comes now the United States of America by its duly appointed, qualified and Acting United States Attorney for the Eastern District of Washington, Edward M. Connelly, and respectfully moves the Court for an order joining Cascade Irrigation District as party defendant in the above-entitled action.

The motion is based upon all of the records and files in the above-entitled proceeding and upon the written consent to said joinder executed by the duly authorized directors of said Cascade Irrigation District, which consent is on file and of record herein, and by this reference made a part hereof.

(Sd) EDWARD M. CONNELLY
United States Attorney

In the District Court of the United States
for the Eastern District of Washington
Southern Division
Civil No. 21
Kittitas Reclamation District, et al.,
Plaintiffs,
v.
Sunnyside Valley Irrigation District, et al.
Defendants.

ORDER FOR JOINDER OF NEW DEFENDANT

The above-entitled matter coming on regularly for hearing this 31st day of January, 1945, upon the motion of United States of America made by and through its duly appointed, qualified and acting United States Attorney for the Eastern District of Washington, Edward M. Connelly, for an order joining Cascade Irrigation District as a party defendant in the above-entitled proceeding, and it appearing to the Court that the Cascade Irrigation District consents to being joined as party defendant in the above-entitled action by virtue of a written consent executed by Leslie Wilson, Guy F. Murchland and Earl E. Anderson, its duly elected and qualified directors, which said consent is approved by Short and Short, its attorneys, and the Court being otherwise fully advised in the premises; now, therefore,

IT IS ORDERED that Cascade Irrigation District be, and it hereby is, made a party defendant in the above-entitled proceeding.

DONE in open Court this 31st day of January, 1945.

(Sd) L. B. Schwellenbach
United States District Judge

PRESENTED BY:
EDWARD M. CONNELLY
United States Attorney

Appendix G

United States Government

MEMORANDUM

Regional Director, Boise, Idaho

Project Superintendent, Yakima, Washington

TWSA

April-September

1. Assumed 30-35 percent of normal precipitation—guesstimate.

2. Projected storage curve to April 1—850,000.

3. Took hard look at Water Supply Available April-September forecast—549,000.

4. Question what figures to use upon which to apply judgment.

How did we get 360,000

1. Adjusted Bureau's February-July 1077 to take out February and March estimates.

Residual . . . 847 based on normal precipitation through forecast period.

2. Compared 847 with Weather Service most probably 549 and Soil Conservation Service 640.

3. Since Weather Service and Soil Conservation Service are April-September numbers and our Bureau of Reclamation number (as we adjusted it) April-July the already high Bureau of Reclamation number would have to be increased to extend to a comparable period April-September. We did not try to do this.

4. We projected Storage gain from February to April 1 as 95,500 a.f.

5. Attempted then to evaluate a number representing the amount of water to be expected from other than the reservoirs which would be available April-September for use above Parker.

6. Our guesstimate was 360,000: to compare with Weather Service and Soil Conservation Service we probably should have added the 95,500 a.f. projected reservoir gain giving a comparable number of 455,500.

7. Without using a formula or any other scientific device to crank out a number we adopted a bottom line forecast heavily influenced by the fact that other forecasts available to use were taking large drops from January to February. We picked 360,000 a.f.

W. G. Gray

Appendix H

43 USC

§ 523. Storage and transportation of water for irrigation districts, etc.

Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under section 641 of this title, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however,* That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works. Feb. 21, 1911, c. 141. § 1, 36 Stat. 925.

APPENDIX I

United States

Department of the Intericr

Bureau of Reclamation

Roza Division—Yakima Project, Washington

Amendatory Repayment Contract Between the United States of America and the Roza Irrigation District

This Amendatory Contract, made this 22nd day of July, 1953, between The United States of America (hereinafter called the United States), acting through the Asst. Secretary of the Interior and pursuant to the Federal Reclamation Laws, and the Roza Irrigation District (hereinafter called the District), an irrigation district organized and existing under and by virtue of the laws of the State of Washington,

Witnesseth, That:

EXPLANATORY RECITALS

2. Whereas, under the authority of the Federal Reclamation Laws, the United States is constructing the Roza Division of the Yakima Project in the State of Washington, known as the Yakima Project;

3. Whereas, the United States and the District, acting pursuant to the Federal Reclamation Laws, entered into a water supply contract dated July 8, 1921, which contract has been supplemented and amended, and the contract for the construction of the canal and distribution system for the Roza Division dated December 13, 1935, which contract has been supplemented and amended;

4. Whereas, the District, as the duly authorized representative of the water users involved, desires to enter into an amendatory contract to secure the benefits of the Reclamation Project Act of 1939 (53 Stat. 1187); and

1 TYPESET ERROR IN THIS PAGE

5. Whereas, the Secertary has determined that in his judgment the provisions of this amendatory contract will provide a fair and equitable treatment of the repayment problem of the water users of the Roza Division, and will be in keeping with the general purposes of the Reclamation Project Act of 1939;

Now, Therefore, in consideration of the mutual and dependent stipulations and covenants herein contained, it is mutually agreed by and between the parties hereto as follows:

DEFINITIONS

6. The following terms hereinafter used in this contract shall have the following respective meanings:

(a) "Secretary" shall mean the Secretary of the Interior or his duly authorized representative.

(b) "Federal Reclamation Laws" shall mean the Act of June 17, 1902 (32 Stat. 388) and all acts amendatory thereof or supplementary thereto, including without limitation by this enumeration the Reclamation Project Act of 1939 (53 Stat. 1187) and the Act authorizing the execution of this amendatory contract.

(c) "Project" shall mean the entire Yakima Project constructed and being constructed by the United States under the Federal Reclamation Laws.

(d) "Government-District contract" shall mean the water supply contract of July 8, 1921, as amended and supplemented by the contract of April 15, 1935, and the contract for the construction of the canal system dated December 13, 1935, as amended and supplemented by contracts dated January 5, 1943, August 11, 1947, January 17, 1949, and January 6, 1953.

(e) "Reserved works" shall mean all the storage reservoirs of the project; the diversion dam and canal headworks located in sections 32 and 33, township 15 north, range 19 east, Willamette meridian; the first 10.9 miles of the Roza canal; Wasteway No. 2; the Roza switchyard and substation, transmission lines, and other pumping plant substations constructed to serve lands in the Roza Division of the project (these works together comprising the

pumping transmission facilities); and all works appurtenant and incidental to any of the foregoing facilities.

(f) "Transferred works" shall mean the irrigation distribution works constructed by the United States in connection with the Roza Division of the project exclusive of the reseved works and the Roza powerplant, consisting of the Roza canal, except the first 10.9 miles, pumping plants, wasteways, laterals and sublaterals and appurtenant facilities in connection therewith.

(g) "Roza powerplant" shall mean the powerplant to be constructed by the United States in section 17, township 13 north, range 19 east, Willamette meridian, at Wasteway No. 2, located at mile 10.9, on the Roza canal, and that amount of capacity of the first 10.9 miles of the Roza canal, the cost of which has been assigned for return from power revenues, together with all appurtenant-facilities in connection therewith, but excluding the works herein defined as reserved works.

SCOPE AND TERM OF AMENDATORY CONTRACT

7. This amendatory contract supersedes and takes the place of the Government-District contract and shall become effective on the date of its execution by the Secretary, after approval by the Congress, in accordance with section 7 of the Reclamation Project Act of 1939. Except as to the provisions of the Government-District contract which have been fully executed prior to the date of this amendatory contract which shall remain unaffected hereby, the Government-District contract shall remain effective only to the extent expressly provided in this contract.

WORKS BUILT OR TO BE BUILT BY THE UNITED STATES

8. (a) The United States has heretofore constructed the works which are required for the impounding of waters for the project, including lands within the District.

(b) The United States will undertake to complete the construction of the Roza powerplant, and the reserved and transferred works needed for the irrigation of the lands within the District, including these principal works:

> A diversion dam and canal headworks on the Yakima River; a main canal for carrying water from the diversion dam approximately 95 miles, known as the Roza canal; 17 electrically powered pumping plants and one turbine-driven pump; the pumping transmission facilities; wasteways; laterals and sublaterals for the delivery of water to the lands in the District; and some main outlet drainage works; together with all works appurtenant or incidental to the foregoing facilities;

all as determined by the United States to be necessary for irrigation service to a maximum of 72,000 acres of irrigable lands within the District.

(c) The estimated construction cost of the works built and to be built to serve the irrigable lands within the District, including two million five hundred thousand dollars ($2,500,000) as the share of the costs of the storage division allocable to the District's rights therein and including a funded operation and maintenance deficit (inclusive of terminal leave payments to employees on the transfer of works to the District whenever that transfer occurs) of not to exceed seven hundred seventy-nine thousand one hundred dollars ($779,100) as of December 31, 1954, but excluding these costs assigned for repayment from power revenues:

> (1) The cost of the Roza powerplant (estimated at two million six hundred seventy-seven thousand dollars ($2,677,000);
>
> (2) One million dollars ($1,000,000) of the cost of the Roza canal;
>
> (3) The Cost of the pumping transmission facilities (estimated at eight hundred eighty-six thousand six hundred twenty dollars ($886,620)); and
>
> (4) One million one hundred thirty-seven thousand eight hundred eighteen dollars ($1,137,818) of the estimated cost of irrigation works;

and also excluding the costs assigned for repayment by other water users organizations or local units of Government and contributions received toward construction costs (estimated at one hundred sixty-three thousand four hundred sixty-two dollars ($163,462)), is eighteen million three hundred ninety thousand dollars ($18,390,000).

(d) Additional expenditures not included in the estimates set forth in (c) of this article may be required to build additional parts of the system of outlet drainage works and other works, the total additional expenditures under this subarticle not to exceed seven hundred sixty thousand dollars ($760,000) of which not to exceed one hundred thousand dollars ($100,000) may be for works other than drainage.

(e) Total expenditures for irrigation works to serve lands within the District including expenditures to be funded as operation and maintenance deficit but exclusive of costs chargeable to the Roza power plant and transmission facilities and exclusive of costs assigned for repayment by other water users organizations or local units of Government and contributions received towards construction costs shall be limited to nineteen million five hundred twenty-seven thousand eight hundred eighteen dollars ($19,527,818) (being eighteen million three hundred ninety thousand dollars ($18,390,000) plus one million one hundred thirty-seven thousand eight hundred eighteen dollars ($1,137,818)) and the cost of future work within the scope and limit of (d) above.

DISTRICT'S CONSTRUCTION CHARGE OBLIGATION

9. (a) The District's original maximum construction charge obligation is hereby established as nineteen million one hundred fifty thousand dollars ($19,150,000), including the estimated operation and maintenance deficit and storage division costs as described in article 8(c) and the estimated cost of future work described in article 8(d). This total amount reduced by:

(1) Any payments made by the District on account of construction charges prior to the effective date of this contract less the amounts being deferred for crediting against annual instalments under the provisions of (b) of article 11;

(2) The excess, if any, of seven hundred seventy-nine thousand one hundred dollars ($779,100) over the actual operation and maintenance deficit to be funded.

(3) The excess, if any, of two million five hundred thousand dollars ($2,500,000) over the actual construction costs allocable to the District's share of the storage division, as finally determined by the Secretary; and

(4) The excess, if any, of seven hundred sixty thousand dollars ($760,000) over the actual costs of the future work done within the scope of (d) of article 8;

comprises the District's net construction charge obligation under this contract.

(b) The Secretary shall notify the District in writing as and when final determination of costs are made as the basis of adjustments as provided in (a) of this article, providing the District with a full statement of the expenditures made and the portions thereof allocable to the District.

(c) There has not been reflected in the District's construction charge obligation any allocation of project costs by reason of benefits from the project to other than irrigation purposes. If allocations of construction costs on a nonreimbursable basis are authorized by law, the Secretary shall notify the District with respect to such nonreimbursable allocations and of the extent to which the District's construction charge obligation will be affected thereby.

(d) The construction charge obligation shall be repaid by the District to the United States in successive annual instalments determined as provided in articles 11 and 12.

ESTABLISHMENT OF IRRIGATION BLOCKS

10. The Secretary has, from time to time, designated by appropriate notices areas of land within the District for which irrigation water was available from the project works at substantially the same time, each of these areas comprising an irrigation block. Seven such blocks have been designated, their respective areas being as established by public notices heretofore issued.

DETERMINATION OF BASIC ANNUAL INSTALMENTS

11. (a) In keeping with the provisions of the Reclamation Project Act of 1939 there is hereby established for each irrigation block a development period of ten years beginning with the first year that water was available to each block for the entire irrigation season, that year being for the respective blocks as follows:

Block	Year
1	1942
2	1943
3	1944
4	1946
5 & 6	1947
7	1951

There is also hereby established an annual construction charge instalment of $4.10 per irrigable acre which, but for the operation of this article, would be effective as to each block beginning with the first year after the close of the development period. It being the desire of the District, however, in order to avoid an abrupt increase in water users payments at the end of the development period, to realize the monetary benefits of the 10-year development period by spreading certain construction charge instalments over a longer period commencing with the first availability of water in each block, the District shall pay its construction charge obligation for the lands in each irrigation block in basic annual instalments determined as provided in this article, each of which shall be due and payable one-half on or before June 30 of the year following that for which it is due and one-half on the succeeding December 31. Each of such basic annual instalments, subject to

adjustment under (b) of this article, shall be the aggregate of the annual sums due and payable by the District to the United States on account of each irrigation block, determined for each block as follows:

(1) For the first five years commencing with the year in which water was first available to the block—$1 times the irrigable area.

(2) For each year commencing with the sixth year for which water was available to the block and continuing through the 20th year—the irrigable area times an annual instalments beginning with $1.20 for the sixth year and increasing by 20 cents each year to $4 for the 20th year.

(3) For each year commencing with the 21st year for which water was available to the block—$4.10 times the irrigable area.

(b) Payments on construction charges made under the terms of the Government—District contract, in the case of some irrigation blocks, have exceeded, and the case of others have been less than, the amounts that would have been paid had the instalments been determined under the provisions of (a) of this article. The Secretary shall notify the District in writing as to the amounts of the excess or deficiency in payments as to each irrigation block as of the effective date of this contract, and the excess or deficiency in payments for any block shall be credited or added, as the case requires, at the rate of $1 per irrigable acre per year on the annual instalment accruing on account of the lands in that block, beginning with the instalments due for the year in which this contract becomes effective until the entire amount of the excess or deficiency in payment for the block has been absorbed.

ADJUSTMENTS OF ANNUAL INSTALMENTS

12. (a) At any time the board of directors of the District may, by appropriate notice, elect to have the basic annual instalments provided in article 11 adjusted in the manner provided in this article, and once having so elected, thereafter each basic annual instalment shall be adjusted in accordance with this article. If the District, not having so elected, becomes delinquent

for more than twelve months in the payment of any construction charge instalment, the Secretary, by written notice to the District, may provide that the basic annual instalments shall be adjusted in the manner provided in this article.

(b) The annual instalment for any calendar year shall be determined by increasing or decreasing the basic annual instalment for that year as computed under article 11 as follows:

(1) The maximum irrigable acreage within the District stated in article 17 as adjusted from time to time shall, for the purpose of this article, comprise the "project contract unit".

(2) Each calendar year for which the basic annual instalments are to be adjusted under this article, the Secretary shall determine the "annual returns", and shall determine the "normal returns" for the project contract unit, and shall determine the "parity ratio".

(i) "Annual returns" shall mean the amount of the gross crop returns per acre of the area in cultivation within the project contract unit for any calendar year, excluding the acreage and income from lands cropped in hops.

(ii) The "normal returns" shall be determined by taking the weighted average of the annual returns of those ten calendar years of the thirteen-year period including the calendar year for which normal returns are being determined and the twelve calendar years preceding it, in which the annual returns for such years are highest. Until such time as adequate records of annual returns for a full thirteen-year period from all irrigation blocks in the District are available, the normal returns may be determined by filling out the thirteen-year period by considering, in addition to the annual returns from the project contract unit, the established annual returns from the Sunnyside Division of the Yakima Project for the years for which such returns from the project contract unit are not available.

(iii) The "parity ratio" for each year as of December 31 of that year shall be determined as follows:

There shall be determined, (1) for the commodity group "all crops and livestock", the average for the year of the national index of prices received by farmers for the commodity group; (2) the average national parity index; and (3) the ratio of the average national index of prices received by farmers for the commodity group to the average national parity index. Average indexes, as required by this subarticle, will be derived by finding the simple average of the montly indexes of prices received by farmers for this commodity group and the simple average of the monthly national parity indexes. This ratio shall be the parity ratio for that year.

The national index of prices received by farmers and the national parity index to be used in the foregoing computations shall be those determined by the Secretary of Agriculture under the provisions of Title II of the Agriculture Act of 1948 (62 Stat.1250), as it may be amended from time to time. The commodity group to be used under (iii) above for the foregoing computations may be changed from time to time by the Secretary if a change is requested by the District's board of directors and if the Secretary finds that such a change is justified because the commodities currently being used in those computations no longer are principal or important factors in the agricultural economy of the project contract unit. If the parity prices which are basic to the determination of the parity ratio hereunder cease to be determined officially by the Secretary of Agriculture at any time during the repayment period, the factor of parity ratio shall no longer be applied in determining any instalment under this contract.

(3) A determination of the annual and the normal returns and the parity ratio by the Secretary for any calendar year will be on the basis of final figures as nearly as practicable. The Secretary, however, on or before September 1 of any year, will on request of the District provide it with an estimate of these factors for that year. In connection with

such request, the District will provide the Secretary with a preliminary crop estimate for the year on or before September 1, or such other date as may be fixed by the Secretary.

(4) Each calendar year for which the basic annual instalments are to be adjusted under this article, the Secretary shall determine the per cent of normal returns for said year by which the annual returns for that year exceed or are less than the normal returns. For each one per cent (1%) or major fraction of one per cent (1%), there shall be an increase or decrease, respectively, of two per cent (2%) in the instalment for that year, as determined under the provisions of article 11, and that sum shall be further increased or decreased by multiplying it by the parity ratio determined under the provisions of (b) of this article; provided, that in no event shall the amount of such adjusted instalment be less than fifteen per cent (15%) or more than one hundred seventy-five per cent (175%) of the base instalment for that year, as determined under the provisions of article 11. In no event, however, shall the last instalment payable by the District under the provisions of article 11 and of this article be in an amount greater than necessary to complete payment of the construction charge obligation under this contract. The Secretary shall notify the District of his determinations under this article on or before February 15 of the calendar year following that for which such determinations are made.

(5) If at any time by reason of the operations of this article the construction charge obligation of the District has been reduced to an amount equal to or less than one hundred fifty thousand dollars ($150,000), the unaccrued portion shall be paid on the due dates of the next instalment without further adjustment under this article.

ROZA POWERPLANT AND POWER RATES

13. (a) Effective as of the date the Roza powerplant is first ready for service hereunder as announced by the Secretary, there is hereby reserved from the electrical power and energy to be produced at the Roza powerplant a sufficient amount of power

and energy to operate all pumping plants to be constructed by the District or the United States to serve the irrigable lands within the District's pump areas. Such reserved power and energy will be available to each of the pumping plants at the voltages and points of delivery as may be agreed on between the District and the United States.

(b) The reserved power and energy shall be made available for the purposes above stated at rates that shall conform to the following standards:

(1) Until there has been returned to the United States its investment in the Roza powerplant and those additional construction costs assigned for return from power revenues as indicated by article 8, the rates to be charged the District for power and energy for irrigation pumping shall be sufficient only to return to the United States the costs of operation and maintenance, including replacements, of the Roza powerplant and pumping transmission facilities, and to return the capital investment in the Roza powerplant and those additional construction costs assigned for return from power revenues, taking into account revenues available from the disposal of power and energy in excess of that reserved and used for irrigation pumping by the district.

(2) After the return of construction costs as provided in (1) above, rates shall be sufficient only to return to the United States such share of the operation and maintenance costs, including replacements, and such other costs as are reasonably and properly allocable to the generation and delivery of the power and energy reserved for and delivered to the District as herein provided.

Rates established hereunder shall be adjusted by the Secretary from time to time to conform to the foregoing standards, but not oftener than once every five years unless otherwise mutually agreed. Payment for reserved power and energy made available as herein provided shall be effected by inclusion of appropriate items therefor in the cost of operation and maintenance of reserved works as provided in article 20.

(c) Until power reserved hereunder is available from the Roza powerplant, the United States, with the approval of the District's board of directors, shall either extend the existing contract of April 30, 1952, between the Bureau of Reclamation and the Bonneville Power Administration, or shall enter into other arrangements, for furnishing to the District electric energy required to operate the pumping plants of the Division. The Secretary shall, by written notice, advise the District of the time and amount of the payments to be made for the furnishing of such power.

(d) Unless and until legislation is enacted authorizing the transfer of the Roza powerplant to the District and the completion of arrangements in accordance with such legislation, title to the Roza powerplant, a plant to be constructed as incidental to the irrigation works to serve the Division, shall be and remain in the exclusive control, possession, and ownership of the United States.

STORAGE AND DELIVERY OF WATER BY THE UNITED STATES

14. (a) The United States will impound and store water for the irrigation of irrigable lands within the District, and will deliver said water from the project supply, subject to the conditions of this contract, and in amounts hereinafter specified at the headworks of the Roza canal.

(b) The total annual supply water that will be delivered by the United States hereunder shall not exceed 375,000 acre-feet measured at the headworks at the diversion dam in the Yakima River except as that quantity may be reduced as otherwise provided in this contract.

(c) The annual supply to be provided hereunder shall be furnished by months, and not to exceed the quantity shown in the following schedule:

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During April	10%
During May	15%
During June	19%
During July	19%
During August	19%
During September	12%
During October	6%

Nothing herein contained shall, however, prevent the United Staes from delivering on a different schedule at the request of the District if a revision of the schedule is not in conflict with other vested water rights and the interests of the United States and the various water users having rights in the project supply will not be injured thereby.

(d) The District's original construction cost obligation for its share of the project water supply, set tentatively at two million five hundred thousand dollars ($2,500,000), shall be determined when costs of the pooled storage of the project's storage division are finally established, in accordance with the provisions of the contract of July 8, 1921, as amended by the contract of April 15, 1935, Symbol and No. Ilr-463.

(e) The supply of water to operate the Roza powerplant will be diverted by the United States at the diversion works and carried through the first 10.9 miles of the Roza canal to Wasteway No. 2. No part of said water supply for the Roza powerplant shall be deducted from the water supply to be made available to the District hereunder.

PRORATION AMONG CONTRACTING PARTIES

15. (a) The United States, to the extent permitted by law, will treat on an equal footing with respect to priority all authorized divisions of the project and all lands of irrigation districts, water users associations, corporations, and all water users with whom the United States has contracted or may hereafter contract under the Federal Reclamation Laws, except to the extent that these provisions are modified by the decree of the United States District Court, dated January 31, 1945, entered in the case of *Kittitas Reclamation District, et al., plaintiffs v. Sunnyside Valley*

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Irrigation District, et al., defendants (Civil Action No. 21, Eastern District of Washington, Southern Division). All water supply contracts hereafter made by the United States with respect to the project shall contain a similar declaration with regard to priority, and the Secretary shall, under the terms of the Federal Reclamation Laws, provide for the irrigation of no greater area of land in the aggregate than will, in his opinion, render it practicable in all years or (sic) ordinary runoff to supply authorized divisions and other contractors with the amounts of water fixed and stipulated by the Secretary. In case of shortage of water in a year of unusually low runoff, such as to make it impossible to supply fully all of the lands governed by similar proration provisions, each division and each contractor shall be entitled to a supply of water diminished pro rata, measured at the respective points of measurement, except as otherwise limited in this article; and it shall be the duty of the project officer, in operating the storage reservoirs constructed by the United States within the Yakima River watershed, to divide the water in accordance with the provisions of this article. The pro rata share herein provided for shall be determined by the ratio of the water supply available for all divisions of the project, and for all parties making contracts of tenor similar to this contract under the Federal Reclamation Laws involving waters of the Yakima River Basin, to the total water supply fixed and stipulated for said divisions and parties, after making appropriate deductions for whatever prior rights are required to be recognized. Delivery of such pro rata share shall be received by the District in full satisfaction of the quantity of water herein contracted for on behalf of the District for such irrigation season.

(b) The provisions of this article and the preceding article 14 are intended, by the restatement thereof, to carry forward and continue in operation the District's rights in the project water supply as defined in the Government-District contract and as modified by the decree referred to in (a) above.

PROTECTION OF WATER SUPPLY

16. In case a dispute arises as to the character, extent, priority or validity of the right of the United States or the District to use

the water supply claimed for the project, the District shall promptly bring and diligently prosecute judicial proceedings for the determination of such dispute and shall take all other measures necessary toward the defense and protection of the water supply, either independently or in cooperation with the United States, where the Secretary and the District board of directors determine that such proceedings or other measures are desirable. Nothing in this article, however, shall be construed as precluding the United States or the District, independently or in cooperation, from taking such action as either the Secretary or the District board of directors deem necessary to protect the water supply.

IRRIGABLE AREA OF THE DISTRICT

17. (a) The irrigable area within the District is estimated not to exceed 72,000 acres, as will be more particularly described in the various public notices that have heretofore been issued or may hereafter be issued by the Secretary with respect to lands in the District.

(b) The water supply made available under this contract shall be furnished only to lands which with the approval of the Secretary have been classified as irrigable.

(c) While the classification of lands as the basis of determining the basic annual instalments to be paid by the District to the United States shall be as above stated, the District board of directors may, with the approval of the individual water users concerned, for purposes of assessments and matters of its own internal administration, make adjustments in the irrigable area from time to time so long as the 72,000 acre maximum limit is not exceeded by more than 1,000 acres. No change in the District's construction charge obligation or in the basic annual instalment will be made by any such adjustments except those that may be provided by the Congress pursuant to the procedure established in (d) of this article.

(d) If at any time, the board of directors of the District shall determine that any specific areas of the District have deteriorated on account of seepage, alkaline or other like reasons to the point where profitable agricultural use may no longer be made of such

areas, and such areas comprise sufficient acreage to reduce the remaining project irrigable area to less than 71,000 irrigable acres, then the said board may, by resolution, request the appointment of a committee for the purpose of investigating the condition of such lands. Upon receipt of such resolution from the District, the Secretary shall appoint a member of the committee, the District shall appoint a member and the members thus appointed shall select a third member. The committee so chosen shall investigate the condition and productivity of the specific areas listed in the resolution and make a report of its findings. The Secretary shall, upon receipt of such report, recommend to the Congress that any lands listed as unsuitable for agricultural use, taking into account district charges for irrigation water, be removed from the list of paying lands of the project and the charges on said lands shall be terminated, and he shall further recommend, to the extent there is no available additional irrigable lands upon which the water may be feasibly used, that the District obligation be reduced by the amounts thereafter to be payable by the lands found to be unsuited for further feasible agricultural use.

INTERIM OPERATION OF THE PROJECT WORKS IN KEEPING WITH THE FEDERAL RECLAMATION LAWS

18. (a) The operation and maintenance of the project works, except for the reserved works and the Roza powerplant, is to be taken over by the District at a time to be announced in writing by the Secretary after the District directors have, by appropriate resolution, indicated approval of the time of transfer. Until such notice of transfer, the United States shall continue to operate the project works, and the District shall pay, in advance, the costs of such operation and maintenance as herein provided.

(b) Payment shall be made for the operation of the works to be transferred on the basis of annual estimates by the Secretary. These estimates shall be in addition to the cost of operation and maintenance of the reserved works, as provided in article 20 and in addition to the cost of power and energy for irrigation pumping to be supplied the District from the Roza powerplant or under the provisions of (c) of article 13. The notice of this annual estimate

shall contain an itemized statement of the estimated cost of operation and maintenance of the works to be transferred to be incurred in the following calendar year. This notice shall be furnished to the District on or before September 1 of the calendar year preceding the one for which the notice is issued. The District shall pay the amount stated in the notice on or before the time established in the notice.

(c) Whenever the funds so advanced to operate the works to be transferred to the District will be inadequate, the Secretary may give a supplemental notice, stating therein the amount of additional funds required, and the District shall advance that additional amount on or before the date specified in the supplemental notice. If funds advanced by the District under this article exceed the actual cost of operation and maintenance of the works to be transferred to the District for the year for which advanced, the surplus shall be credited on the operation and maintenance charges for the works to be transferred to become due for succeeding years.

(d) This article is to be in effect only until such time as the Secretary announces that said works are to be transferred to the District and the District takes over said works in compliance with said notice.

TRANSFERRED WORKS: CARE, OPERATION AND MAINTENANCE THEREOF

12. (a) At any time after the effective date of this contract, and after obtaining the consent of the board of directors of the District, the Secretary may transfer to the District the care, operation and maintenance of the works defined herein as the transferred works, or any part thereof. At the time of such transfer, the Secretary shall notify the District of his intention so to transfer to the District and shall furnish an appropriate listing of the works to be transferred.

(b) All equipment and supplies being used by the United States for the operation and maintenance of the works to be transferred and which the Secretary determines, after consultation with the District, will be required for District operation and

maintenance, shall be so transferred. The transfer shall be made, however, only on the making of contractual arrangements satisfactory to the Secretary for payment to the United States, within not to exceed five years from the date of transfer, of that part of the cost of the equipment and supplies involved not theretofore charged to the District.

(c) Upon the works being transferred, the District will accept the care, operation and maintenance of the transferred works, and will continue to care for, operate and maintain the transferred works in such manner that they will remain in as good and efficient condition and of equal capacity for the carrying and distribution of irrigation water as of the date of the transfer to the District, and will use all proper methods to secure the economical and beneficial use of the irrigation water. The care, operation and maintenance of the transferred works, after transfer to the District, shall be without cost or expense to the United States.

OPERATION AND MAINTENANCE OF RESERVED WORKS

20. (a) The reserved works shall continue to be under the care, operation and maintenance of the United States. The District shall pay to the United States the cost of operating and maintaining the reserved works, including the cost of power and energy furnished under (c) of article 13; but, commencing with the date when the Roza powerplant is ready for service as announced by the Secretary under the provisions of article 13, the costs of operation and maintenance, including replacements, of the transmission facilities shall be excluded from the costs of reserved works which are to be paid by the District under the provisions of this article, thereafter to be treated as part of the cost of providing power and energy for irrigation pumping under the provisions of (a) and (b) of article 13.

(b) Payment shall be made for each calendar year on the basis of annual estimates by the Secretary. The notice of these annual estimates shall contain an itemized statement of the estimated cost of operation and maintenance of all reserved works to be incurred in the following calendar year, including the District's

share of rehabilitation and betterment expenditures that have been or may hereafter be scheduled by the Secretary for return over an extended period. The notice shall be furnished to the District on or before Septmeber 1 of the calendar year preceding the one for which the notice is issued. The District shall pay the amount stated in the notice on or before the time established in the notice.

(c) Whenever the funds so advanced will be inadequate to operate and maintain the reserved works, the Secretary may give a supplemental notice, stating therein the amount of the additional funds required, and the District shall advance that additional amount on or before the date specified in the supplemental notice. If funds advanced by the District under this article exceed the actual cost of operation and maintenance of the reserved works for the year for which advanced, the surplus shall be credited on the operation and maintenance charges to become due for succeeding years.

KEEPING TRANSFERRED WORKS IN REPAIR

21. (a) The District shall promptly make any and all repairs to the transferred works for the proper care, operation and maintenance of the transferred works. No substantial change in any of the transferred works shall be made by the District without first obtaining the written consent of the Secretary.

(b) The Secretary may cause to be made, from time to time, a reasonable inspection of the transferred works to ascertain that the terms of this contract are being met by the District.

TITLE OF TRANSFERRED WORKS

22. Title to the transferred works shall remain in the United States until otherwise provided by the Congress.

OPERATION AND MAINTENANCE CHARGE LEVIES AND ASSESSMENTS

23. (a) The provisions of this article are made with the object, among other things, of encouraging the economical use of

water and of distributing the operation and maintenance charges equitably among the lands of the District.

(b) Each year the District shall assess an amount necessary to pay the operation and maintenance of the works of the District, including the cost of power as provided in article 13. The assessment to be made hereunder is to be apportioned equally among all the irrigable lands of the District, and shall include all charges to be made under the terms of this contract, including the cost of power for irrigation pumping, but exclusive of the charges for the basic annual instalment of the District lands, as provided in article 11 hereof.

(c) The District shall levy a minimum annual operation and maintenance charge against each irrigable acre within the District, and the payment of such minimum charge shall be required whether or not water is used. The amount of water in acre-feet per acre which is to be delivered each year on payment of the minimum annual charge shall be determined by the District's board of directors, but it shall not exceed three (3) acre-feet for the lands in the District. For water to be delivered each year in excess of the minimum amounts, the landowners or water users involved shall pay to the District an excess charge as follows:

(1) For the first additional acre-foot, or fraction thereof, at a rate per acre-foot not less than 10% more than the rate charged for water made available under the annual minimum charge for each unit.

(2) For the next additional acre-foot, or fraction thereof, at a rate per acre-foot not less than 25% more than the rate charged for water made available for the year under the annual minimum charge for each unit.

(3) For each additional acre-foot, or fraction thereof, at a rate per acre-foot not less than 50% more than the rate charges for water made available for the year under the annual minimum charge for each unit.

RESERVE FUND FOR OPERATION AND MAINTENANCE

24. (a) The District shall establish a reserve fund for operation and maintenance of the transferred works, which fund shall be maintained by the District apart from other District funds in a depository meeting the requirements of the laws of the State of Washington as to the disposition of irrigation district funds, or may be invested in United States bonds or in such other securities as are approved by the Secretary.

(b) The District shall include in the annual operation and maintenance assessments levied against the water users in the District an annual amount per irrigable acre for the accumulation of such reserve fund until it equals two hundred eighty-eight thousand dollars ($288,000). The annual assessment shall be not less than equal to 5 per cent of the average operation and maintenance charge for the preceding five (5) years until said sum of two hundred eighty-eight thousand dollars ($288,000) has been accumulated, and thereafter such further annual amounts shall be levied whenever the fund has been reduced below that amount.

(c) The funds shall be available only (1) to meet those costs of operation and maintenance of project works which are unusual or extraordinary after advance notice in writing has been given to the Secretary as to a proposed use, and (2) to meet other operation and maintenance costs when the use therefor is approved in advance by the Secretary.

DEFAULT: RESUMPTION OF CONTROL OF TRANSFERRED WORKS

25. (a) Should the District, after transfer to it of the transferred works, default in any manner in the performance of any of the provisions of this contract, and should it fail to correct the default within sixty (60) days after request in writing by the Secretary so to do, the United States may take over the operation and maintenance of all of any part of the transferred works. Such operation and maintenance by the United States shall continue until the Secretary determines that the District is again capable of

operating and maintaining all or any part of the transferred works then being operated and maintained by the United States, and that all or a part of those works should be retransferred to the District. When such determination is made, written notice thereof, together with the effective date of the retransfer, shall be given to the District; and the District shall accept the operation and maintenance of the portion of the transferred works thus retransferred on the effective date and shall thereafter operate and maintain those works in accordance with this contract.

(b) During any time any of the transferred works are operated and maintained by the United States, the cost of operation and maintenance shall be paid annually in advance by the District to the United States. Such payments shall be on the basis of annual estimates made by the Secretary. Such annual estimates shall contain a statement of the estimated cost of operation and maintenance of the transferred works to be incurred by the United States in the following year. The notice of estimates shall be furnished to the District on or before September 1 of the calendar year preceding the one for which the notice is issued. When the United States takes over initially the operation and maintenance of any part of the transferred works, the Secretary shall give the District immediately:

(1) A notice of the estimated amount of such charge from the time the United States started operating and maintaining the works to the end of that calendar year; and

(2) A notice to cover the following year when the initial taking over occurs after September 1 of any year.

(c) The District shall pay the amounts set out in any such notice to be paid by the District on or before the date or dates fixed by the Secretary, and shall without delay levy whatever special assessments or toll charges are necessary to raise the funds for payment of such amounts.

(d) Whenever in the opinion of the Secretary funds so advanced will be inadequate to operate and maintain the works being operated by the United States, he may give a supplemental notice stating therein the amount of additional funds required, and the District shall advance that amount on or before the date

specified in the supplemental notice. If funds advanced by the District under this article exceed the actual cost of operation and maintenance for such works for the year for which advanced, the surplus shall be credited on any amounts thereafter to become due from the District.

GENERAL OBLIGATIONS—ASSESSMENTS

26. (a) All the lands included in the District shall be obligated through the District to pay to the United States the full amount of the construction charge obligation to be paid by the District for the lands of the District as provided in article 9 of this contract, regardless of delinquencies as to particular lands in payment to the District of assessments and charges.

(b) The District shall cause to be levied and collected all necessary assessments and charges, and will use all the authority and resources of the District to make all payments to the United States when due and to meet its other obligations under this contract.

(c) Should the District be in default at any time in the payment of construction charge instalments, the Secretary, by written notice to the District may require the District to levy toll charges for the collection of its construction charge instalments from water users in advance of water delivery, and also establish a toll charge to be paid in advance of water delivery in addition to, or in the place of, any toll charges levied by the District.

COMPUTATION OF COSTS

27. The cost, which makes up the various obligations to be paid by the District to the United States under this contract, shall embrace all expenditures within the maximums set out in this contract of whatsoever kind in relation to the function for which the charge is made, including, but without limitation by reason of this enumeration, cost of surveys and investigation, labor, property, material and equipment, engineering, legal, superintendence, administration, overhead, general expenses, inspection, special services and damage claims of all kinds, whether or not involving

the negligence of the officers, agents, or employees of the United States.

REFUSAL TO DELIVER WATER IN CASE OF DEFAULT

28. (a) No water from the project water supply shall be delivered to or for the District if the District is in arrears in the advance payment of operation and maintenance charges owed to the United States, if any, or more than twelve (12) months in arrears in the payment of construction charge obligation instalments, or more than twelve (12) months in arrears in the payment of any other amounts owed to the United States under this contract. The District shall refuse to deliver water to lands or parties who are in arrears in the advance payment of operation and maintenance charges due from such lands or parties to the United States or to the District, or to lands or parties who are in arrears for more than twelve (12) months in the payment of amounts due from such lands or parties to the United States or to the District for construction charge obligations or for any other amounts owed by the District to the United States under this contract. The provisions of this article are not exclusive and shall not in any manner prevent the United States from exercising any other remedy given by this contract or by law to enforce the collection of any payments due under the terms of this contract.

(b) The United States may enter on the transferred works or any part thereof in possession of the District to shut off water being delivered in violation of the provisions of this article or article 31. In the event the United States enters onto the transferred works or any part thereof in possession of the District, neither the United States nor its officers or employees shall be liable for any damages resulting directly or indirectly from the refusal to deliver water which had been heretofore delivered in violation of the provisions of this article or of article 31.

PENALTY FOR DELINQUENCY IN PAYMENT

29. Every instalment or charge required to be paid to the United States under this contract and which remains unpaid after

it shall become due and payable shall be subject to and the District shall pay a penalty at the rate of one-half per cent per month from the date of delinquency.

ALL BENEFITS CONDITIONED UPON PAYMENT

30. (a) Should the District fail to levy the assessments, tolls, or other charges against any lands in the District required to be levied to meet the District's obligation to the United States under this contract, or, having levied, should the District be prevented from collecting such assessments, tolls, or other charges by any judicial proceedings, or otherwise fail to collect them, such lands shall not be entitled to receive water from the project supply, and the District, except as otherwise ordered by a court of competent jurisdiction, shall not deliver water to such lands from the project water supply unless and until arrangements for its delivery satisfactory to the Secretary have been made.

(b) As to any such lands the District is hereby authorized, as a fiscal agent of the United States, to collect whatever charges may be required under the delivery arrangements made as provided in this article. Payment shall be required as a condition precedent to the delivery of water. Collections so made by the District shall be paid promptly to the United States in the manner directed by the Secretary.

(c) No action taken by the Secretary under the provisions of this article shall in any manner relieve the District of the obligations assumed by it under this contract.

LANDS FOR WHICH WATER IS FURNISHED; LIMITATIONS ON AREA

31. (a) The water delivered under the terms of this contract shall be used solely for distribution by the District to water users for irrigation and domestic uses incidental thereto.

(b) The District (and the United States while it is operating and maintaining the transferred works) will operate the irrigation system to the end of making available to each irrigable acre of

land in the District, during each irrigation season, that quantity of water to which it is entitled.

(c) Pursuant to the provisions of the Federal Reclamation Laws, water made available hereunder shall not be delivered to more than one hundred sixty (160) irrigable acres of land in the project in the ownership of any one person or other entity, except that, if irrigable lands in excess thereof have been acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance or devise, water therefor may be furnished temporarily for a period not to exceed five (5) years from the effective date of such acquisition or such longer period as may be approved by the Secretary. In the case of an individual either having stock in two or more corporations which have title to irrigable lands within the project or owning irrigable land in his own name and having stock in a corporation or corporations which have irrigable lands within the project, the individual's proportionate stockholdings in such corporations shall be regarded as proportionate interests in the corporations' landholdings for the purpose of the application of the acreage limitation stated in this article. The limitation stated in this subarticle shall cease to operate when the construction charge obligation hereunder to the United States has been paid in full. It shall cease, also, as to the land in any one ownership when the construction charge obligation hereunder allocable to such land has been fully paid to the United States.

UNITED STATES NOT LIABLE FOR WATER SHORTAGE OR INTERRUPTION

32. No liability shall accrue against the United States or any of its officers, agents or employees for damage, direct or indirect, arising by reason of shortages in the quantity of water available through the project works or interruptions in water deliveries to lands in the District resulting from drought, inaccuracy in distribution, hostile diversion, prior or superior claims, accident to or failure of facilities of the project works, whether or not attributable to negligence of officers, agents, or employees of the United States, or other causes of whatsoever kind. Nor shall the District's

obligations to the United States under this contract be reduced by reason of such shortages or interruptions.

WASTE, SEEPAGE AND RETURN-FLOW WATERS

33. (a) The United States or the District does not abandon or relinquish any of the waste, seepage, or return-flow waters attributable to the irrigation of the lands to which water is supplied under this contract. All such waters are reserved and intended to be retained for the use and benefit of the United States as a source of supply, first, for the lands within the District, and thereafter for lands within the project.

(b) If suitable drainage or return-flow waters from any part of the project shall at any time be or become available at points where it can be used on lands of the District, the United States or the District may supply such water as a part of the supply to which the lands in the District are entitled, except that the utilization of such waters from lands within the District shall not reduce the entitlements of the District to the diversions at the headworks of the Roza Canal as established in article 14.

INSPECTION OF TRANSFERRED WORKS

34. The Secretary may cause to be made, from time to time, after advance consultation with the District, a reasonable inspection of the transferred works to ascertain whether the terms of this contract are being met by the District. Such inspections shall not exceed one a year and the District shall be provided with a report of each such inspection.

USE OF PROJECT FACILITIES FOR MISCELLANEOUS PURPOSES; REVENUES THEREFROM

35. (a) The United States, as owner, may use or permit the use of any project facility or feature for any purpose not inconsistent with the rights of the District under this contract.

(b) Miscellaneous revenues received from incidental activities in connection with the construction or operation and maintenance

of the reserved works shall be and remain the property of the United States.

(c) Miscellaneous revenues received from incidental activities in connection with the operation and maintenance of the transferred works shall accrue to the benefit of the District and shall be credited against the District's net construction charge obligation.

BOOKS, RECORDS, AND REPORTS

36. (a) The District shall maintain a set of books of account, showing all financial transactions of the District, keep such other records as the Secretary may request, and submit such reports based thereon as he may require from time to time.

(b) Subject to applicable Federal laws and regulations, the secretary of the District, or his representative, shall have full and free access at all reasonable times to the project account books and official records of the Bureau of Reclamation relating to the construction and operation and maintenance of the project and the status of the accounts concerning the District's payments of construction and operation and maintenance charges, with the right at any time during office hours to make copies thereof. Subject to applicable state laws and regulations, the proper representatives of the United States shall have similar rights in respect to the account books and records of the District.

CROP RETURNS AND CENSUS

37. (a) The District shall furnish to the United States each year, on or before December 31 of the year, reports covering the crops produced on lands within the District.

(b) Should the District elect to adjust its annual instalment under the provisions of article 12, then at such times as the Secretary deems it necessary or desirable, but only after first consulting with the board of directors of the District, the Secretary may cause a special crop census to be taken on all or any part of the lands in the District, but such special census shall not be taken oftener than once each calendar year. Such a census shall be for the purpose of checking the crop reports furnished to the

United States by the District and of furnishing an independent source of information as to the agricultural income from the lands in the District. In connection with such a census the Secretary may require information to be given under oath. In the event any water user refuses to give such information when requested to do so by the Secretary's authorized representative, the representative may estimate the crop production and per-acre income of such water user. Estimates so made shall be given the same weight as though based on information furnished under oath by the water user in adjusting the annual sum to be paid by the District under this contract.

OVERHEAD, INSPECTION, AND REPAIR CHARGES TO BE PAID BY THE DISTRICT

38. (a) On July 15 of each year, from the effective date of the transfer to the District of works for operation and maintenance pursuant to article 19 until the District's construction charge obligations to the United States are repaid in full, the following costs for each calendar year, ending on the preceding December 31, shall be paid:

(1) The cost of any inspections under the provisions of article 34.

(2) Cost of repairs to the transferred works made by the United States under the provisions of articles 19 and 21.

(3) Cost of any special crop census under the provisions of article 37.

(4) Other costs for such work performed for the benefit of the District by the United States at the direction of the Secretary which, by Federal Reclamation Laws, are chargeable to the District.

(b) To the extent possible, services for which costs are applicable under this article shall be undertaken only after first informing the District of the services involved and their probable costs. The first payment under this article shall be due and payable on July 15 of the year following the notice provided in article 19, and shall cover the calendar year ending the preceding

December 31, but the determinations of costs hereunder shall not include items of cost that have accrued and for which the District has made other arrangements for payment or satisfaction.

EMPLOYMENT OF MANAGER

39. Until the construction charge obligations under this contract have been paid in full, the District shall employ as manager or superintendent a competent irrigation engineer, or other person who has had at least three (3) years' experience as a manager or superintendent in the operation of works similar to the transferred works of the District. The employment of such manager or superintendent shall be subject to the approval of the Secretary. Should the Secretary, after first consulting with the District's board of directors, give notice that any manager or superintendent employed by the District is unsatisfactory in that capacity and provide his reasons therefor, the District will promptly terminate the employment of such person, and will employ one that is satisfactory.

PERFORMANCE OF WORK WITH CONTRIBUTED FUNDS

40. (a) At the request of the District, the United States, at its option, pursuant to the act of March 4, 1921 (41 Stat. 1367, 1404), may perform with funds contributed by the District any construction or maintenance work within the authority of the District but which is not otherwise provided for by this contract. If the United States determines that it will undertake any such work, funds therefor shall be advanced by the District as directed by the Secretary. The advance shall be accompanied by a certified copy of a resolution of the District's board of directors describing the work to be done and authorizing its performance by the United States with the District's funds.

(b) After completion of any work so undertaken, the United States shall furnish the District with a statement of the cost of the work done. Any unexpended balance of the funds advanced will be refunded to the District or applied as otherwise directed by the District.

RIGHTS-OF-WAY

41. (a) The United States, so far as is practicable, will, without charge, use for works that may be built under this contract rights-of-way reserved under the act of August 30, 1890 (26 Stat. 391), but the District shall, at the request of the United States, secure releases to the United States and the District as to all damages that may arise in connection with the exercise of these rights-of-way.

(b) The District shall, if and when requested by the Secretary, acquire and convey to the United States all lands or interests in lands required for the construction and operation and maintenance of any works that may be built under this contract.

TERMINATION OF RECORDABLE CONTRACTS

42. (a) The termination date of the provisions of the Government-District contracts providing for recordable contracts entered into thereunder between landowners and the District shall be the effective date of this contract. All payments made or to become due to the District on or before that date under those contracts on account of such provisions shall be retained or collected and applied as therein provided.

(b) After the termination date of these contracts the Secretary will announce, by an appropriate recordable document, this termination, and will take appropriate steps, by offering for filing in the appropriate county offices, to establish of public record the fact of termination.

CONFIRMATION OF CONTRACT

43. The execution of this contract shall be authorized or ratified by the qualified electors of the District at an election held for that purpose. The District, after the election and upon the execution of this contract, shall promptly secure a final decree of the proper court of the State of Washington approving and confirming this contract and decreeing and adjudging it to be a lawful, valid, and binding general obligation of the District. The

District shall furnish to the United States certified copies of such decrees and of all pertinent supporting records.

CHANGES IN DISTRICT ORGANIZATION

44. While this contract is in effect, no changes shall be made in the District, either by inclusion or exclusion of lands, by partial or total consolidation or merger with another district, by proceedings to dissolve or otherwise, except with the consent of the Secretary evidenced in writing.

PUBLIC LANDS SUBJECT TO ASSESSMENT

45. Pursuant to the provisions of section 3 of the act of May 15, 1922 (42 Stat. 541), all unentered public lands and entered public lands for which no final certificate has been issued embracing any of the irrigable lands within the District are hereby designated as subject to the provisions of the act of August 11, 1916 (39 Stat. 506); provided, that unentered public lands while in that status shall not be assessed by the District for any purpose.

REGULATIONS AND DETERMINATIONS OF FACT

46. (a) The Secretary, after consultation with the District, may, so far as the purport thereof may be consistent with the provisions of this contract, make regulations and add to and modify them, as are proper and necessary to carry out the true intent and meaning of this contract, and to supply details of its administration.

(b) In the event of disputes among the parties hereto arising out of this contract involving questions of fact, and so far as the provisions hereof require a determination of fact to be made, the Secretary may, after consultation with the District, make a decision thereon which shall be conclusive upon the parties hereto.

NOTICES

47. Any notice, demand or request required or authorized by this contract shall be deemed properly given, except where otherwise herein specifically provided, if mailed, postage prepaid, to the Regional Director, Bureau of Reclamation, Boise, Idaho, on behalf of the United States, and to the Secretary, Roza Irrigation District, Zillah, Washington, on behalf of the District. The designation of the person to be notified or the address of such person may be changed at any time by similar notice.

DISCRIMINATION AGAINST EMPLOYEES OR APPLICANTS FOR EMPLOYMENT PROHIBITED

48. The District shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and shall require an identical provision to be included in contracts relating to the performance of this contract. This provision, however, does not refer to, extend to, or cover the activities of the District which are not related to or involved in the performance of this contract.

CONTINGENT ON APPROPRIATIONS OR ALLOTMENT OF FUNDS

49. The expenditure of any money or the performance of any work by the United States herein provided for, which may require appropriations of money by the Congress or the allotment of Federal funds, shall be contingent on such appropriations or allotments being made. The failure of the Congress to appropriate funds, or the failure of any allotment of funds, shall not, however, relieve the District from any obligations theretofore accrued under this contract, nor give the District the right to terminate this contract as to any of its executory features. No liability shall accrue against the United States in case such funds are not so appropriated or allotted.

ASSIGNMENTS PROHIBITED; SUCCESSORS AND ASSIGNS OBLIGATED

50. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract, or any part thereof, or interest therein, shall be valid until approved by the Secretary.

OFFICIALS NOT TO BENEFIT

51. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA

By /s/ Fred G. Aandahl
Assistant Secretary of the Interior

ROZA IRRIGATION DISTRICT

By /s/ H. Loyd Miller

(SEAL)

Attest:

/s/ Ross Morris
Secretary

(3)

Office - Supreme Court, U.S.
FILED
JUL 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1702

In the Supreme Court of the United States

OCTOBER TERM, 1984

H.F. ALLEN ORCHARDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
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Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Bureau of Reclamation breached a contractual duty to issue an accurate prediction of the total expected water supply in the Yakima Basin for the 1977 growing season.

1. Petitioners are farmers in the State of Washington who are members of various Yakima Project irrigation districts. The Yakima Project is a water project constructed by the federal government pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 *et seq.*, to provide participating irrigation districts with water from the Yakima River. The Bureau of Reclamation contracts with the irrigation districts to deliver water from the Yakima Project and charges a fee to cover the Project's construction, operation and maintenance costs. The fee generally is passed on to the members of the districts—ultimate water users such as petitioners. Pet. App. A2, A10-A11.

The allocation of water from the Yakima Project among the irrigation districts is governed by a consent decree entered in *Kittitas Reclamation District* v. *Sunnyside Valley Irrigation District*, Civ. No. 21 (E.D. Wash. Jan. 31, 1945). (The decree is reprinted at Pet. App. A77-A106.) The consent decree defines the total water supply available (TWSA) as (*id.* at A103-A104):

> that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

The TWSA is allocated first to irrigation districts with senior, nonproratable rights and then to districts with junior, proratable rights (*id.* at A2-A3, A103-A105). Petitioners are members of districts with proratable rights (*id.* at A2-A3, A12).

In 1977 a water shortage occurred in the Yakima area due to drought and low snow pack (Pet. App. A12). The irrigation districts were concerned about their water supply and, partially in response to their requests, the Bureau of Reclamation in February 1977 issued a preliminary estimate of the amount of water that would be available for the growing season. The Bureau projected that irrigation districts with nonproratable rights would receive all of their allotment, but districts with proratable rights would receive 6%-7% of their allotment. *Id.* at A13. Farmers with proratable water rights, such as petitioners, reacted to this estimate by planting less water-intensive crops, allowing lands to lie fallow, and selling off livestock prematurely (*id.* at A3). In succeeding months the Bureau increased its projection due to

greater than expected precipitation and the inclusion in the projections of estimates of irrigation runoff. Irrigation districts with proratable rights eventually received 70% of their normal supply of water (*id.* at A13), but petitioners assert that they incurred heavy losses as a result of their initial water conservation efforts.

2. Petitioners filed suit in the Claims Court against the United States claiming that the 1945 consent decree and the irrigation districts' contracts with the Bureau obligated the Bureau to make accurate estimates of water availability. They asserted that the Bureau breached this obligation in February 1977 by negligently predicting the available water supply.

The Claims Court granted summary judgment in favor of the government (Pet. App. A9-A30). The court found that neither the 1945 consent decree nor the irrigation contracts between petitioners and the Bureau "expressly obligated [the Bureau] or the United States to furnish to [petitioners] any advance estimate or forecast of the total water supply available for irrigation purposes during the entire growing season" (*id.* at A15). The court also concluded that petitioners "failed to supply any factual predicate from which it [could] be concluded that the Bureau impliedly obligated itself to make such advance estimates or forecasts" (*id.* at A17). In addition, the court determined that petitioners had "no enforceable rights against the United States" (*id.* at A19) because they were neither parties to nor third-party beneficiaries of the irrigation contracts (*id.* at A19-A30).

The court of appeals affirmed (Pet. App. A1-A8). The court found that petitioners were third-party beneficiaries of the contracts and the consent decree and therefore could maintain the action for breach of contract (*id.* at A8). However, the court of appeals agreed with the Claims Court that the Bureau was under "no contractual obligation to

accurately estimate the [available water supply]" (*id.* at A4), and held that the Claims Court properly granted judgment for the government.

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court of petitioners' fact-bound contract claim is not warranted.

a. Petitioners' principal contention is that the 1945 consent decree and the irrigation contracts between the Bureau of Reclamation and the irrigation districts "expressly and impliedly" obligate the Bureau to furnish petitioners with a "timely and competent computation" of the total water supply available for distribution to the irrigation districts (Pet. 3). This claim is totally without merit; both courts below correctly found that the Bureau was under "no contractual duty to project the [available water supply] correctly, or at all, or warranty that any projection made will be correct." Pet. App. A4; see also *id.* at A15-A18. The courts below concluded that no express provision of the consent decree or the contracts imposes such a duty (*id.* at A4-A5, A15-A16), and petitioner has not cited any such provision in this Court (see Pet. 14-15). In addition, as the court of appeals observed, "there is nothing in the circumstances surrounding the entrance of the decree or in any custom or usage to suggest that the decree was formalizing any prior act or obligation of the government to forecast the [available water supply]. * * * [W]e find that at the time [the decree was entered] the parties did not intend to obligate the Bureau to forecast accurately the [available water supply]. Such an obligation cannot now be added by this court" (Pet. App. A6).[1]

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[1]Petitioners rely (Pet. 15) upon *Owyhee Ditch Co.* v. *United States*, 126 F. Supp. 429 (D. Ore. 1954), but that case concerned a breach of an express contractual obligation to deliver water. Petitioners have not cited a similar express provision imposing an obligation to predict the available water supply.

The courts below also correctly concluded that no implied contract required the government to furnish water supply forecasts. Petitioners have failed to show any facts establishing the prerequisites for such an implied contract —(1) the parties' intention to enter into an agreement, and (2) action by an officer with authority to bind the government. Pet. App. A6-A7, A16-A18; see also *City of Alexandria* v. *United States*, 737 F.2d 1022, 1027 (Fed. Cir. 1984); *Narva Harris Construction Corp.* v. *United States*, 574 F.2d 508, 511 (Ct. Cl. 1978). Petitioners claim (Pet. 15-17) that their water rights under the contracts and the consent decree are "illusory" if the government is not required to supply a prediction of the amount of water that will be available. However, farmers typically must make their own assessments concerning rainfall and other sources of water that will be available for a forthcoming growing season; nothing in the contracts or consent decree indicates that the government agreed to perform this task for petitioners.[2]

b. Petitioners also assert (Pet. 8-10) that the government breached a fiduciary duty to petitioners by issuing an erroneous forecast of the available water supply. However, none of the authorities cited by petitioners even refers to any obligation to predict future water availability. Petitioners' assertions of the existence of a general "fiduciary duty"

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[2]Petitioners' assertions (Pet. 18) regarding the government's "concessions" of the legal issues in this case are unfounded. For example, petitioners support their contention that the government has conceded that the Bureau had a contractual duty by reciting the fact that the Bureau made calculations of water availability. But the government's decision voluntarily to provide this service surely does not by itself impose upon the government a contractual obligation.

Petitioners' contentions (Pet. 13-14) regarding the government's alleged negligence are irrelevent. As the court of appeals observed, the "negligent performance of a noncontractual duty cannot be the basis of a breach of contract claim" (Pet. App. A7).

simply provide no basis for imposing upon the United States the obligation to issue water supply forecasts.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JULY 1985

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[3]Moreover, the court of appeals correctly noted (Pet. App. A4, A7-A8) that a claim based upon an extra-contractual duty would not be cognizable under the Tucker Act, 28 U.S.C. 1491.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

H. F. ALLEN ORCHARDS, et al., ELBERT B. SCHINMANN, et al.,
R. E. REDMAN & SONS, INC.,
Petitioners,

VS.

THE UNITED STATES,
Respondent.

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The United States, in its Opposition to the Petition for Writ of Certiorari ("Opposition"), argues fervently that it should not be legally responsible for precipitation forecasts that go astray.

The Opposition should be set aside for future use in a case that raises the issues it attempts to rebut. *This is not such a case.*[1]

As is clear from the pleadings and the various documents filed with the court below in this Petition for Writ of Certiorari, the Bureau of Reclamation ("the Bureau") simply incorrectly computed the extant water it had available in early 1977 in the various reservoirs of the Yakima Project.[2]

When the Superintendent of the Yakima Office of the Bureau, William Gray, made his front-page admission, "We blew it," he was not referring to weather forecasting.

> "There was water in the system that we didn't know we had . . ." F.C. App. VI, p. 1003.

The shocking differential between the water that the Bureau announced would be available in early 1977, and the water that proved to be available, was not caused by either faulty weather forecasting or by an unpredictably heavy rainfall after the February 1977 computation.[3]

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[1] The underlying premise of the government's position, that if it can succeed in convincing the court that this is a weather forecasting case, it will have no liability, is not correct. Whether the government is liable for damage caused by negligence in forecasting depends upon the particular facts and context of the prediction. See, e.g. *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2nd Cir. 1967), in which the United States was forced to bear the consequences of an incorrect forecast. The present case, however, *is not a forecasting case.*

[2] It is obvious from the record that the Bureau did not correctly measure the snowpack in the Yakima Valley watershed either.

[3] As demonstrated by Table 3 in the Vissia Report (page A-65 in Appendix to Petition for Writ of Certiorari), the aggregate rainfall at five project stations from February through May 1977, was 52.21 inches,

In its focus on a non-issue, weather forecasting, the United State perpetuates the error of the courts below, and mischaracterizes the case. The case deserves to be analyzed on its actual facts, under the theories actually urged by the farmers and under the law that controls those theories, and not under hypothesized facts and law. Before this case can be properly decided, it must be fairly characterized. To characterize it as a case centering on weather forecasting serves neither the task of this Court nor the interests of justice.

On page 5 of its Opposition, the United States treats its announcements of the water that would be available to the farmers as of no more consequence than an estimate by a third party, or the farmers themselves. This argument is enormously distortive. The early 1977 announcements of the water that would be available were qualitatively different than anything which could have come from the farmers or a third party. The Bureau, which *controlled* the water, was telling the farmers how much water would be available to them. The Bureau was not saying to the farmers: "In our disinterested estimation, it appears to us that there will be X amount of water available to you this summer." Rather, the Bureau was saying to the farmers: "This is how much of your water we are going to release to you this summer under our contractual obligations."

This difference is, needless to say, crucial. The farmers' response was prudent. Indeed, had they ignored these announcements, they would have done so at their peril, and risked worse damage than they actually suffered.

The United States, in its Opposition, made no effort to rebut most of the farmers' points, including (1) their need for early information as to water available, (2) the basic errors in premise and computation made by the Bureau, and (3) the fact that unless the Bureau is held to a reasonable standard of performance in its early-season announcements, the contracts are essentially illusory and meaningless in short-water years.

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as compared to a normal aggregate for the same five stations of 69.81 inches.

This case involves unsettled questions of law, and a Court of Appeals opinion that deviates from clear guidelines laid down by this Court in a series of reclamation cases which have defined the various rights and obligations of the water users, the districts, and the Bureau. It has brought chaos into law that was well settled, and upon which those involved in the reclamation process relied and acted.

It is respectfully urged that under the criteria that govern this Court's acceptance of cases, this is an appropriate case for this Court's intervention. There are unanswered questions that need definition. Stability in the law and in the Bureau-district-farmer relationship, severly harmed by the opinions below, needs to be restored. Justice needs to be extended to hundreds of farmers in the Yakima Valley who had no option but to rely on the Bureau, and who reasonably relied upon the Bureau to their damage.

Dated: August 8, 1985.

Respectfully submitted,

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